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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 499

GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

vs.

P. B. SULLIVAN, DOING BUSINESS AS ALBERTA
COAL SALES COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1934.

CERTIORARI GRANTED DECEMBER 3, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

P. B. SULLIVAN, Doing Business as ALBERTA COAL SALES COMPANY, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant

COMPLAINT—Filed April 22, 1931

Plaintiff complains of defendant and alleges that:

I

During the times herein mentioned, plaintiff was, and still is, a sole trader doing business as Alberta Coal Sales Company and engaged generally in the business of wholesaling coal.

II

During the times herein mentioned, defendant was, and still is (a) a common carrier engaged in the transportation of property wholly by railroad in interstate commerce; and in commerce between points in Canada and points in the United States; and in commerce between points on the international boundary line between the United States and Canada and points in the United States; and (b) as such common carrier, subject to the provisions of the Act to [fol. 2] Regulate Commerce, approved February 4th, 1887, and acts amendatory thereof and supplemental thereto.

III

At all the times hereinafter mentioned, the railroads of defendant and its common connecting carriers, constituted a continuous line of railroad and a through route for the transportation of freight from various coal originating points in the province of Alberta, Canada, including Kipp, Tabor, Occidental, Lethbridge, Kneehill and Drumheller, to points on defendant's railroad in North Dakota and Minnesota; that said defendant at all said times had, and still has, traffic arrangements with common carriers, subject to Act to Regulate Commerce at various stations and places along the line of its railroad, and particularly at points where its railroad reaches the international boundary in Minnesota and North Dakota, said international boundary points being junction points between defendant's railroad and railroads engaged as common carriers in the Dominion of Canada; and that said defendant at all times both received and handled, and still receives and handles, traffic including coal from its said connections at various points including the junction points aforesaid.

IV

During 1925, 1926, 1927, 1928, plaintiff shipped, or caused to be shipped, from the originating points generally described in section III of this complaint to various destinations on defendant's railroad in North Dakota and Minnesota, (including those set forth in Exhibit "B" attached hereto and made a part hereof), numerous carloads of coal; that for the transportation of said shipments by defendant from the international boundary junction points where defendant received said shipments, defendant charged, collected and received from plaintiff the several rates and charges duly published and filed by defendant with the Interstate Commerce Commission, and on file with said Commission at the time each of said shipments were so transported in defendant's several lawfully published, filed and applicable tariffs including those referred to in Exhibit "B" aforesaid; that the rates so published and filed and so charged, collected and received, and paid by plaintiff for said transportation on each of said shipments of coal in carloads, were, when said rates and charges were exacted by defendant and paid by plaintiff, unjust, unreasonable, arbitrary, confiscatory and unlawful in violation of section I of said Act to Regulate Commerce.

V

[fol. 3] On or about August 15, 1927, plaintiff duly commenced a proceeding against defendant before the Interstate Commerce Commission, which, under the Act to Regulate Commerce and acts amendatory thereof and supplemental thereto, had jurisdiction in that behalf over the parties and subject matter in said proceeding, by filing its petition with said Interstate Commerce Commission in which plaintiff set forth the facts substantially as hereinabove set forth, complaining of the aforesaid alleged violations of the Act to Regulate Commerce and praying that the defendant above named might be required to answer the charges therein contained; that after due hearing and investigation, an order be made commanding the said defendant to cease and desist from the aforesaid violations of the Act to Regulate Commerce and pay the plaintiff herein by way of reparation for the unlawful charges hereinbefore described such sum as, in view of the evidence to be adduced therein, the Commission might consider the plaintiff is entitled to, and that such order or further order or orders might be made as the Commission might consider proper in the premises and that plaintiff's cause might appear to require; that plaintiff will produce and offer said complaint in evidence at the trial of this action; that said proceeding before the Interstate Commerce Commission was known and designated on the dockets of said Commission as "Alberta Coal Sales Company et al. vs. Canadian National Railways et al.," Interstate Commerce Commission Docket No. 19997; that a copy of the complaint and supplemental complaint in said proceeding together with the several exhibits attached to said complaint and supplemental complaint was duly served upon and received by defendant, and defendant is hereby referred to said complaint and supplemental complaint and the exhibits thereto attached for information respecting the allegations and contents thereof, and said complaint and supplemental complaint together with the exhibits severally attached thereto are hereby, by reference, incorporated herein and made a part hereof.

VI

After the filing of said complaint with said Interstate Commerce Commission and the due service of the said complaint upon defendant, the defendant herein duly answered the same, and said proceeding being at issue upon complaint and answer on file with the Interstate Commerce Commission, a hearing was thereafter duly had upon the [fol. 4] issues raised by said complaint and answer, and having been duly heard and submitted by the parties thereto, and full investigation of the matters and issues involved therein having been had, the Commission did, on or about the 12th day of May, 1930, by an order made on said day, authorize and order the defendant herein to pay the plaintiff on or before June 26th, 1930, the sum of Three Thousand, Nine Hundred Ninety and 20/100 Dollars ($3,990.20), with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment of the freight charges upon the several shipments made by plaintiff, as reparation for damages caused by applying and collecting said unjust, unreasonable and inapplicable rates charged for the transportation of said carload shipments of coal hereinbefore referred to; that said order was duly served upon the defendant and a copy thereof is hereto attached, made a part hereof, and entitled Plaintiff's Exhibit "A."

VII

The defendant has refused and neglected and still refuses and neglects to pay said plaintiff any part of said sum of Three Thousand, Nine Hundred Ninety and 20/100 Dollars ($3,990.20), and interest as provided by the terms of said order, and that the time to pay said sum in pursuance of said order has passed, and said sum with interest thereon at six per cent (6%) as provided by said order is now due and owing from defendant to plaintiff.

VIII

Wherefore, plaintiff demands judgment against defendant in the sum of Three Thousand, Nine Hundred Ninety and 20/100 Dollars ($3,990.20), with interest thereon as provided by the terms of said order, Plaintiff's exhibit "A," plus a reasonable attorney's fee, together with the costs and disbursements of this action.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff, 910 McKnight Building, Minneapolis, Minnesota.

[fol. 5] EXHIBIT "A" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of May, A. D. 1930

No. 19997

ALBERTA COAL SALES COMPANY et al.

vs.

CANADIAN NATIONAL RAILWAYS et al.

It appearing that on May 7, 1928, the commission entered its report in the above-entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we find that complainants and intervener shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest.

Complainants	Defendants	Amounts
Alberta Coal Sales Company	G. N.	$3,990.20
Do.	Soo. and G. N.	284.05
Do.	N. P.	168.01
Do.	Soo.	2,518.91
Do.	Soo. and N. P.	83.75
Do.	Soo. and G. F. & S. C.	40.69
Do.	Soo. and Mid. Cont.	51.20
Piper-Howe Lumber Company	Soo.	496.72
Intervener	Defendants	Amounts
Monarch Elevator Company	N. P.	$49.15
Do.	G. N.	171.72

It is therefore ordered that the defendants named in each of the groups shown in the above table be, and they are hereby, authorized and directed to pay unto the complainants and intervener shown opposite said groups, on or before June 26, 1930, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rate charged for the transportation of numerous carloads of [fol. 6] lignite and bituminous coal from Province of Alberta, Canada, to destinations in North Dakota and Minnesota.

By the Commission.

(Seal.) George B. McGinty, Secretary.

Index of Abbreviations

FG&SC	Farmers Grain & Shipping Company.
Gn	Great Northern Railway Company.
NP	Northern Pacific Railway Company.
Mid. Cont.	Midland Continental Railroad.
Soo.	Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 13, 1931

Defendant for its answer to the complaint in the above entitled case:

I

Admits the allegations contained in paragraphs 1 and 2 thereof.

II

Admits that at all times mentioned in the complaint the railroads of defendant and its connecting common carriers constituted a continuous line of railroad and a through route for the transportation of freight from various points in the Province of Alberta, Canada, to points on defendant's railroad in North Dakota and Minnesota, and that at all times mentioned in the complaint the defendant received and handled traffic, including coal, from the international boundary between the United States and the Dominion of Canada to destinations on defendant's railroad in North

Dakota and Minnesota, including traffic which originated at points in the Province of Alberta, Canada.

III

Admits that, during the years 1925, 1926, 1927 and 1928, plaintiff shipped or caused to be shipped from points of origin in the Province of Alberta, Canada, to destinations on defendant's railroad in North Dakota and Minnesota, [fol. 7] certain car loads of coal and that the defendant collected and received from the plaintiff, for the transportation of said shipments of coal through rates equal to the sums of the several rates duly published by the defendant and the connecting common carriers. Denies that the rates so published by said connecting common carriers and by defendant, and so charged, collected and received by defendant and paid by the plaintiff for said transportation were, when said rates and charges were exacted by the defendant and paid by plaintiff, unjust, unreasonable, arbitrary, confiscatory or otherwise unlawful, in violation of Section 1 of the Act to Regulate Commerce.

IV

Admits that on or about August 15, 1927, plaintiff, doing business as Alberta Coal Sales Company, duly commenced a proceeding against the defendant and other common carriers by rail, including said connecting common carriers, in which said Alberta Coal Sales Company attacked those portions or factors of the said through rates from points in the Province of Alberta to destinations in North Dakota and Minnesota that were applicable from said international boundary to said destinations, said proceeding being known as I. C. C. Docket No. 1997, Alberta Coal Sales Company et al. vs. Canadian National Railways et al.

V

Admits that on or about May 12, 1930, the Interstate Commerce Commission made and entered an order in said proceeding authorizing and directing the defendant herein to pay the plaintiff herein on or before June 26, 1930, the sum of $3,990.20, with interest thereon at the rate of 6% per annum from the respective dates of payment of the freight charges upon the several shipments made by plaintiff and that said order was duly served upon the defendant.

VI

Except as herein specifically admitted defendant denies each and every allegation, matter of fact and thing contained in said complaint.

VII

Further answering, defendant alleges that said carloads of coal shipped by plaintiff from points of origin in the Province of Alberta to destinations on defendant's line in North Dakota and Minnesota were handled by said connecting lines and by defendant as through shipments from the point of origin in the Province of Alberta to the destination [fol. 8] in North Dakota or Minnesota under a common arrangement between such lines for a continuous carriage.

VIII

Defendant further alleges that the several rates on coal published by the said connecting common carriers from said points of origin in the Province of Alberta to the said international boundary and the several rates published by the defendant from said international boundary to said destinations in North Dakota and Minnesota were what are commonly known as proportional rates and were applicable, respectively, only on shipments that originated at points other than said international boundary and were destined to points other than said international boundary.

IX

Defendant further alleges that the charges collected by defendant for the transportation of said coal from points of origin in the Province of Alberta to destinations in North Dakota and Minnesota were computed by the use of said through rates based on the sum of the said proportional rates to and from the said international boundary.

X

Defendant further alleges that there was no evidence before the Interstate Commerce Commission in the proceeding entitled "Alberta Coal Sales Company vs. Canadian National Railways et al." to support the findings of fact made by the Commission therein; that said findings of fact were not sufficient, in law, to support the order made by the Commission upon which this action is based, and the Commission had no authority in law to enter said order.

Wherefore, defendant prays that the complaint herein be dismissed and that defendant have its costs and disbursements.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated May 12, 1931.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

REPLY—Filed May 19, 1931

Plaintiff for its reply to the answer of the above named defendant in the above entitled action:

I

Denies each allegation of said answer, save and except the allegations thereof which admit the allegations of plaintiff's complaint.

II

Wherefore, plaintiff prays judgment against defendant as prayed for in its complaint.

Dated May 16, 1931.

Stanley B. Houck & Ormie C. Lance, Attorneys for Plaintiff, 910 McKnight Building, Minneapolis, Minnesota.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING JURY—Filed May 23, 1932

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause and agree to submit the same to the court without the intervention of a jury.

Dated May 19th, 1932.

Stanley B. Houck, Attorney for Plaintiff. J. P. Plunkett, Attorney for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF TRIAL—Sept. 21, 1932

Before Judge Joyce.

The above entitled action came on this day to be tried to the Court, trial by jury having been expressly waived by stipulation filed herein; Mr. Stanley B. Houck appearing as attorney for the plaintiff and Mr. J. P. Plunkett appearing as attorney for the defendant.

[fol. 10] Mr. Plunkett argues the case to the Court on behalf of the defendant.

Mr. Houck argues the case to the Court on behalf of the plaintiff.

Mr. Plunkett further argues the case to the Court on behalf of the defendant, and moves for judgment in favor of the defendant on the ground that there was no substantial evidence of record to support any other conclusion than that defendant was entitled to judgment. (No ruling.)

Said action is submitted to and taken under advisement by the Court.

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

P. B. SULLIVAN, Doing Business as ALBERTA COAL SALES COMPANY, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant

JUDGMENT—July 27, 1933

This matter came on to be heard before the court on September 21, 1932, at St. Paul, Minnesota, a jury trial having been waived by stipulation. Mr. Stanley B. Houck represented the plaintiff and Mr. J. P. Plunkett represented the defendant. The case was tried upon an agreed statement of facts, which the court adopts and makes a part of its finding herein. Arguments were made, briefs filed and considered, and the court concludes as a matter of law, and it is

Ordered, that the plaintiff is entitled to and have judgment against the defendant in the amount of Three Thousand Nine Hundred Ninety and 20/100 Dollars ($3,990.20) with interest from May 12, 1930, at six per cent per annum [fol. 11] to the date of payment. A memorandum incorporating the views upon which the foregoing conclusion is reached is hereto attached and made a part hereof.

To all of which the defendant is accorded an exception.

Dated at St. Paul, Minnesota, July 27, 1933.

Matthew M. Joyce, United States District Judge.

MEMORANDUM

The statement of facts makes unnecessary any detailed repetition of the evidence whereby the present action arises. Briefly, the plaintiff filed its complaint before the Interstate Commerce Commission in Docket No. 19997, which was submitted February 3, 1928, and decided May 7, 1928, involving an attack on certain rates on carload lots of lignite coal from international border points in Minnesota and

North Dakota to destinations in those states, applying only on coal originating in Canada. These rates were attacked as being unreasonable in violation of Section 1 of the Interstate Commerce Act. The Commission found in accordance with the prayer of the complaint, prescribed a scale of rates for the future and awarded reparation, which the defendant has failed to pay. The case is here under the provisions of Section 16 of the Interstate Commerce Act, plaintiff seeking to recover upon the amount of the award with interest allowed by the order of the Commission.

The question here presented is as to whether or not the findings of fact made by the Commission are sufficient in law to support its order awarding damages to the plaintiff.

The through rate under which the traffic moved consisted of a proportional rate from point of origin in Canada to the border, applicable only on shipments destined to points southerly of the border, combined with another proportional rate from the border point to the point of destination applicable only on shipments originating north of the border. The Canadian rate represented the share of the total rate received by the Canadian carrier and the American rate represented the share received by the American carrier, the defendant herein.

It is to be noted that the Commission made no finding that the through rates from the origins in Alberta to destinations in North Dakota were unjust and unreasonable, although it [fol. 12] had power to determine the reasonableness of such a rate but lacked power under the provisions of the Act to prescribe or to regulate such rates. Lewis, etc. vs. Southern Pacific, 283 U. S. 654. With reference to the power of the Commission in that connection the court said:

> "It applies to international commerce only insofar as the transportation takes place within the United States."

What the Commission did in the case here was to find that the proportional rates from the international boundary to North Dakota destinations were unjust and unreasonable. In fact this was the case before the Commission as the complaint made no attack on the through rate. The Lewis case, supra, further states:

> "The act prohibits every excessive charge, whether exacted directly or obtained by indirection, and its provisions are designed to prevent evasion of the rule that every charge

for transportation shall be just and reasonable. * * * Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier."

This provision of the Act, as construed by the Supreme Court, places a duty on the carrier in the performance of service to establish just and reasonable rates for whatever that service may be. Here the service the rates for which are complained of as being a violation of law was that performed from the Canadian border to destination points in the two states mentioned. It cannot be questioned that the Interstate Commerce Commission, under the Act as construed by the Supreme Court, possesses jurisdiction to pass on the rates so promulgated for the service so performed. So that we have a service from the border down, over which the Commission possesses authority to determine the reasonableness of the rates therefor, and that is what was done in this case; and while the Supreme Court in News Syndicate vs. New York Central, 275 U. S. 179, uses the language, "had the through rate been just and reasonable, no damages would have resulted to plaintiff in error," it does not seem to me to be in conflict with the finding here, because in that case the defendant had failed to publish charges from point of origin to the international boundary and from the boundary point to destination. There might be no way to determine as to a violation of the Act except by determining the reasonableness of the through charge. The News Syndicate case also states with reference to the application of Section 16:

[fol. 13] "And it was the duty of the Commission to ascertain the damages sustained. It is obvious that in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted."

I am of the opinion that the duty existed on the part of the carrier to have its proportional rate from the border to destination just and reasonable, and if they failed so to do the one aggrieved could avail himself of the remedies provided by the Act. In my judgment the Commission had full authority to determine the reasonableness of the rate from the border to destination. Such a rate must of necessity under the law be published. It constituted a tariff charge which the Commission has found to be unreasonable and for which wrong, it has, as I see it, properly awarded reparation, there being a sufficient basis for such an award and a proper foundation existing for the maintenance of the proceedings herein.

Wherefore, in accordance with said Order and Memorandum, it is by the Court considered, ordered and adjudged that the plaintiff herein, P. B. Sullivan, doing business as Alberta Coal Sales Company, do have and recover of and from the defendant herein, Great Northern Railway Company, the sum of Three Thousand Nine Hundred Ninety and 20/100 Dollars ($3,990.20) with interest from May 12, 1930, at six per cent per annum to the date of payment.

It is further ordered that a stay of forty-two days from this date of all proceeding excepting the entry of judgment be and the same hereby is granted said defendant within which time it may make a motion for a new trial or take such steps in the premises as it may be advised.

[fol. 14] IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

[Title omitted]

STIPULATION FOR CORRECTION OF JUDGMENT

The undersigned attorneys for the parties to the above entitled action stipulate and agree as follows:

(1) That in lieu of the judgment in favor of plaintiff and against defendant in the amount of Thirty-nine Hundred Ninety and 20/100 Dollars ($3,990.20) heretofore entered in this proceeding there shall be substituted for said judgment judgment in the amount of Forty-seven Hundred Fifty-three and 62/100 Dollars ($4,753.62), together with interest at the rate of six per cent per annum on Thirty-nine Hundred Ninety and 20/100 Dollars ($3,990.20) from May 12, 1930, to the date of payment of said judgment and interest at the rate of six per cent per annum on Seven

Hundred Sixty-three and 42/100 Dollars ($763.42) from the date hereof to the date of payment of said judgment.

(2) That the execution of this Stipulation by defendant shall not prejudice any of defendant's rights to take an appeal from the said judgment on any grounds which would have been available to defendant had this Stipulation not been entered into.

Dated September 25, 1933.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff. R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER CORRECTING JUDGMENT

Upon the foregoing stipulation the Clerk of the above named Court is hereby directed forthwith to substitute for the judgment heretofore entered in the above entitled action pursuant to an order of this Court heretofore made a judgment in favor of plaintiff and against defendant in the amount of Forty-seven Hundred Fifty-three and 62/100 Dollars ($4,753.62), together with interest at the rate of [fol. 15] six per cent per annum on Thirty-nine Hundred Ninety and 20/100 Dollars ($3,990.20) from May 12, 1930, to the date of payment of said judgment and interest on Seven Hundred Sixty-three and 42/100 Dollars ($763.42) at the rate of 6 per cent per annum from the date hereof to the date of payment of said judgment, and said order for judgment heretofore made is hereby amended and modified in conformity herewith.

Robert C. Bell, Judge.

Dated September 25th, 1933.

Wherefore, in accordance with said stipulation and order, it is by the Court considered, ordered and adjudged that the plaintiff herein, P. B. Sullivan, doing business as Alberta Coal Sales Company, do have and recover of and from the defendant, Great Northern Railway Company, said sum of $4753.62, together with interest at the rate of 6% per annum on $3990.20 from May 12, 1930, to the date of payment of said judgment, and interest on $763.42 at the rate of 6% per annum from the date hereof to the date of payment of said judgment.

It is further ordered that a stay of forty-two days from this date of all proceedings excepting the entry of judgment and judgment for costs, be and the same hereby is granted said defendant within which time it may make a motion for a new trial or take such steps in the premises as it may be advised.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Sept. 25, 1933

To the Honorable Matthew M. Joyce, District Judge:

The above named defendant feeling aggrieved by the judgment rendered and entered in the above entitled cause on July 27, 1933, as amended by the judgment entered September 25, 1933, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and it prays that an appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the said Circuit Court of Appeals under the rules of said Court in such case made and provided, and the petitioner further states that plaintiff has waived both cost and supersedeas bond, which waiver is [fol. 16] attached hereto, and prays that this appeal be allowed without bond.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated September 25, 1933.

WAIVER OF COST AND SUPERSEDEAS BOND AND CONSENT TO STAY

Now comes the plaintiff above named, by and through its attorneys of record, and waives both cost and a supersedeas bond on any appeal taken by the defendant from the judgment entered herein, and consents to the making of an order allowing an appeal by the defendant without either a cost or supersedeas bond, and providing that all proceedings herein be stayed to the same extent as if a supersedeas bond had been filed and approved.

Dated September 25th, 1933.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff, 910 McKnight Building, Minneapolis, Minnesota.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Sept. 27, 1933

Upon motion of Messrs. R. J. Hagman and J. P. Plunkett, attorneys for defendant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore filed and entered herein be, and the same hereby is, allowed, and that a certified transcript of the record, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals.

It is further ordered that said appeal is allowed without either a cost or supersedeas bond, and that all proceedings [fol. 17] herein be stayed in the same manner and to the same extent as if such bonds had been filed and approved.

By the Court:

Matthew M. Joyce, Judge.

Dated September 27th, 1933.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Sept. 25, 1933

Now comes the Great Northern Railway Company, the defendant and appellant in the above entitled proceeding and respectfully assigns the following errors in the record and proceeding in said case:

1. The United States District Court for the District of Minnesota, Third Division, erred in failing to find as a matter of law that the findings of fact made by the Interstate Commerce Commission were not sufficient in law to support its order awarding damages to the plaintiff.

2. The said Court erred in denying defendant's motion for finding and judgment in its favor upon the ground that there was no substantial evidence of record to support any other conclusion than that defendant was entitled to judgment.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

Dated September 25, 1933.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRAYER FOR REVERSAL—Filed Sept. 25, 1933

Now comes the Great Northern Railway Company, the defendant in the above entitled proceeding, and respectfully prays that for the errors assigned and filed herewith, the judgment of the United States District Court for the District of Minnesota, Third Division, entered herein on the 27th day of July, 1933, as amended by judgment entered September 25, 1933, in favor of the plaintiff, P. B. Sullivan, doing business as Alberta Coal Sales Company, and against the defendant, Great Northern Railway Company, in the sum of Forty-seven Hundred Fifty-three and 62/100 [fol. 18] Dollars ($4753.62) be reversed and a judgment rendered in favor of the said Great Northern Railway Company and for its costs.

Dated this 25th day of September, 1933.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Service of the within prayer for reversal admitted at ——, Minn., this — day of September, 1933.

Stanley B. Houck & Ormie C. Lance, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

P. B. SULLIVAN, Doing Business as ALBERTA COAL SALES COMPANY, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant

Bill of Exceptions—Filed Sept. 27, 1933

The above entitled cause came on for trial before Hon. Matthew M. Joyce, one of the Judges of the above-named Court on Wednesday, September 21, 1932, at 10 o'clock A. M., at the Federal Building, St. Paul, Minnesota, jury having been waived by the parties.

There were present and appearing:

Mr. Stanley B. Houck on behalf of the plaintiff.

Mr. J. P. Plunkett on behalf of the defendant.

Thereupon the following proceedings were had:

The following stipulation of facts was introduced and filed:

STIPULATION OF FACTS

"The parties to the above entitled action, by their respective attorneys, agree as follows:

[fol. 19]

I

(a) That the following statement of facts is true, and that on the trial of said action, this statement may be received in evidence and shall be competent and sufficient proof of the facts herein set forth, and that no further evidence of such facts shall be required.

(b) Each party reserves the right to object to the reception in evidence of any fact contained in the following statement on the ground that the same is irrelevant or immaterial.

(c) Each party reserves the right to offer on the trial of this action additional evidence of any fact put in issue by the pleadings.

II

During the times herein mentioned, plaintiff was, and still is, a sole trader doing business as Alberta Coal Sales Company, and as such was engaged generally in the business of wholesaling coal.

III

During the times herein mentioned, defendant was, and still is: (a) a common carrier engaged in the transportation of property wholly by railroad in interstate and foreign commerce; and in commerce between points in Canada and points in the United States; and in commerce between points on the international boundary line between the United States and Canada and points in the United States; and (b) as such common carrier was, and still is, subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

IV

At all the times hereinafter mentioned, the railroads of defendant and its connecting common carriers constituted a continuous line of railroad and a through route for the transportation of freight from various coal originating points in the Province of Alberta, Canada, to points on defendant's railroad in North Dakota; and that said defendant at all times herein mentioned, both received and handled traffic including coal from its said connection.

V.

During 1925, 1926, 1927, and 1928, plaintiff shipped, or caused to be shipped, from the originating points, more specifically set forth in Exhibit "A" attached hereto and made a part hereof under the heading "origin in Alberta," [fol. 20] to the various destinations on defendant's railroad in North Dakota, more specifically set forth in the column of said exhibit entitled "Destination in North Dakota," numerous carloads of coal, a more specific description of which is set forth in the several columns of said exhibit. Said shipments of coal were transported by defendant and its connecting common carriers from the several points of origin in the Province of Alberta to the several destinations in the State of North Dakota in accordance with the terms of bills of lading executed at the several points of origin. For the transportation of said shipments defendant charged, collected and received from the plaintiff the charges set forth in the column of said exhibit entitled "Total freight charges." Said freight charges were computed by applying to the weight of said shipments, shown in the column of said exhibit entitled "Weight," the sum of the rate shown in the columns of said exhibit entitled, respectively, "Rate to border," and "Rate from border." Rates shown in the column headed "Rate to border" were duly published by the Canadian Pacific Railway Company, a common carrier by railroad operating in the Dominion of Canada, and filed with the Board of Railway Commissioners for Canada, and filed with the Board of Railway Commissioners for Canada, and with the Interstate Commerce Commission. Said rates were what are commonly known as "proportional rates" to the international boundary between the United States and Canada applicable only on shipments destined to stations in the United States beyond said boundary. Rates shown in the column headed "Rate from border" were duly published by the defendant and filed with the Interstate Commerce Commission. Said rates were proportional rates from the international boundary applicable only on shipments originating in the Province of Alberta. The freight charges applicable to that portion of the haul from the point of origin to the international boundary were paid by the defendant to its connecting common carriers operating north of said boundary. Said Exhibit "A", so incorporated herein and made a part hereof, in its several columns reading from left to right of said exhibit, sets forth: (1) the date when each of said shipments was made at the originating point in Alberta, Canada; (2) the date when each of said shipments was delivered at the destination after the completion of their transportation; (3) the date when charges upon each of said shipments was paid; (4) the initial and number of the car in which each of said shipments was made; (5) the point in Alberta, Canada, where each of said shipments originated and from which it was shipped; (6) the destina- [fol. 21] tion in North Dakota to which each of said shipments was destined; (7) the route over which each of said shipments was transported between origin and destination points and the gateway at the international boundary at which each of said shipments entered the United States; (8) the distance from the origin point to the international boundary; (9) the distance from the international boundary to the destination; (10) the total distance between the point of origin and the destination; (11) the weight of each of said shipments; (12) the proportional rate from the point of origin to the international boundary; (13) the proportional rate from the international boundary to the destination; (14) the total through rate, which is the sum of the rates shown in columns (12) and (13); (15) the freight charges collected on that portion of the haul from the point of origin to the international boundary; (16) the freight charges collected on that portion of the haul from the international boundary to the destination; (17) the total freight charges collected for the haul from the point of origin to the destination, being the sum of the freight charges shown in columns (15) and (16); (18) the rate from the international boundary to the destination found reasonable by the Interstate Commerce Commission; (19) the freight charges applicable to the haul from the international boundary to the destination computed at the rates found reasonable by the Interstate Commerce Commission; (20) the amount of reparation, without interest, awarded by the Interstate Commerce Commission, being the difference between the freight charges shown in column (16) and those shown in column (19).

VI

On or about August 15, 1927, plaintiff duly commenced a proceeding against defendant before the Interstate Commerce Commission by filing its petition with said Interstate Commerce Commission in which plaintiff set forth the facts substantially as hereinabove set forth, and alleged that the rates and charges collected for that portion of the haul from the international boundary to the destinations were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and prayed that the defendant be required to pay to the plaintiff by way of reparation for the unlawful charges alleged to have been collected, such sum as said Interstate Commerce Commission should determine was due the plaintiff. Said proceeding before the Interstate Commerce Commission was known and designated on the dockets of said Commission as "Alberta [fol. 22] Coal Sales Company et al. versus Canadian National Railways et al., Interstate Commerce Commission Docket No. 19997." A copy of the complaint and supplemental complaints in said proceeding, together with the several exhibits attached to said complaint and supplemental complaints are hereto attached, incorporated herein, and made a part hereof as Exhibits "B", "C", "D", "E", "F", "G", "H" and "I".

VII

After the filing of said complaints with said Interstate Commerce Commission and the due service of said complaints upon defendant, the defendant herein duly answered the same, and the said proceeding being at issue upon complaint and answer on file with the Interstate Commerce Commission a hearing was thereafter duly had upon the issues raised by said complaint and answer. At such hearing plaintiff and defendant herein introduced oral evidence and exhibits. A transcript of the oral evidence adduced at said hearing is incorporated herein and made a part hereof as Exhibit "J". The exhibits introduced at said hearing are incorporated herein and made a part hereof as Exhibits "K-1" to "K-26", inclusive. Said transcript and exhibits set forth in Exhibits "J" and "K-1" to "K-26", inclusive, comprise all of the evidence, oral or wrtten, that was introduced at said hearing. The parties hereto having been duly heard and a full investigation of the matters and issues involved in said complaint having been had, the Commission did on or about May 7, 1928, render its decision and order in which it found that the rates used in computing the charges collected on said shipments from the international boundary to the destinations of such shipments were unjust and unreasonable to the extent that they exceeded certain rates set forth in said decision and order. On or about May 12, 1930, the Commission by an order made on said day authorized and ordered the defendant herein to pay the plaintiff on or before June 26, 1930, the sum of three thousand nine hundred ninety and 20/100ths dollars ($3,990.20), with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment of the freight charges upon the several shipments made by plaintiff as reparation for damages caused by defendant collecting charges computed by the use of rates which said Commission in its said decision and order of May 7, 1928, found were unjust and unreasonable for the transportation of said shipments of coal hereinbefore referred to from the international boundary to said destinations. Said decision and order dated May 7, 1928, and said [fol. 23] order dated May 12, 1930, were duly served upon the defendant. A copy of said decision and order dated May 7, 1928, is attached hereto and made a part hereof, and entitled "Exhibit L". A copy of said order dated May 12, 1930, is attached hereto and made a part hereof, entitled "Exhibit M".

VIII

The defendant has refused and still refuses to pay plaintiff any part of said sum of three thousand nine hundred ninety and 20/100ths dollars ($3,990.20), and interest, as provided by the terms of said order of May 12, 1930, the time to pay said sum in pursuance of said order has passed and said sum, with interest thereon at six per cent (6%) per annum as provided by said order, is now due and owing from defendant to plaintiff, if plaintiff is entitled to recover anything under his complaint."

Thereupon Mr. Plunkett argued the case to the Court on behalf of the defendant and Mr. Houck argued the case on behalf of the plaintiff.

MOTION OF DEFENDANT FOR JUDGMENT

Thereupon Mr. Plunkett moved the Court for judgment in favor of the defendant on the ground that there was no substantial evidence of record to support any other conclusion than that defendant was entitled to judgment.

EXHIBIT "A"

Excerpts from claim of the Alberta Coal Sales Company under Decision of the Interstate Commerce Commission in Docket 19997—Canadian Lignite Coal.

Origin in Alberta	Destination in North Dakota	Distance to International Border	Distance from International Border	Rate to Border	Rate from Border
Drumheller	Sarles	627	293.1	$3.30	$3.50
Drumheller	Antler	627	218.9	3.30	2.90
Taber	Appam	521	158.5	3.30	2.40
Kipp	Aye	560	277.4	3.30	3.35
Kipp	Pantry	560	134.	3.30	2.15
Kipp	Barton	560	151.5	3.30	2.40

[fol. 24]

EXHIBIT "B"

Complaint

Before the Interstate Commerce Commission

ALBERTA COAL SALES COMPANY, PIPER-HOWE LUMBER COMPANY, Complainants,

vs.

CANADIAN NATIONAL RAILWAYS (Lines Port Arthur, Armstrong, Ont., and West Thereof), Canadian Pacific Railway, Farmers Grain & Shipping Company, Great Northern Railway Company, Midland Continental Railroad, Midland Railway Company of Manitoba, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Northern Pacific Railway Company, Defendants

The complaint of the above-named complainants respectfully shows:

I

That the Alberta Coal Sales Company is a firm owned and operated by Patrick B. Sullivan for the purpose of buying, selling, and distribution of coal and fuel of all kinds, maintaining headquarters at Devils Lake, North Dakota; that the Piper-Howe Lumber Company is a corporation, existing under and by virtue of the laws of the State of Minnesota, with headquarters at Minot, North Dakota, and is engaged in the wholesale and retail distribution of coal and other fuels, lumber and building materials, operating branch yards in the states of North Dakota and Montana.

II

That the defendants above named are common carriers engaged in the transportation of property, wholly by railroad between points in the Dominion of Canada and points in the States of North Dakota and Minnesota, and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III

That the Alberta Coal Sales Company bought and sold what is commonly shown as Lignite Coal in carloads which originated at mines at Kipp and Taber, the Province of Alberta in the Dominion of Canada and sold same F. O. B. destination to retailers and other consumers of coal at various points in the States of North Dakota and Minnesota as more specifically described in Appendices "A" to "W" inclusive, attached hereto and made a part hereof.

[fol. 25] IV

That the Piper-Howe Lumber Company purchased eighteen carloads of Lignite Coal from Lethbridge and Drumheller (Kneehill) in the Province of Alberta in the Dominion of Canada, all of which were brought F. O. B. mines and shipped to, and sold at retail from the branch yards of the Piper-Howe Lumber Company in the State of North Dakota. That the eighteen shipments referred to are more specifically described in Appendi*x*- "X" and "Y" attached hereto and made a part hereof.

V

That there are no joint through rates in effect on Lignite Coal from Canadian mines on the lines of the Canadian

National or Canadian Pacific Railways, to points in North Dakota or Minnesota beyond the International Boundary junctions in North Dakota and Minnesota at the present time nor were there any joint through rates in effect at the time of the shipments described in Appendices "A" to "Y" inclusive. That freight charges on all shipments herein complained of, were assessed on basis of combination of proportional rates to and from the several International Boundary junctions, viz.: Neche, Pembina, or Portal, North Dakota and Noyes, Minnesota, when originated by the Canadian Pacific Railway and Northgate, N. D., or Emerson, Manitoba, when originated by the Canadian National. That the rates from Canadian mines to the International Boundary points named are carried in Canadian National Tariff No. 260-B, C. R. C. No. W-487 and Canadian Pacific Tariff No. W-5379, I. C. C. No. W-723. That the factors up to the International Boundary points are not herein attacked as being in violation of the Interstate Commerce Act, the entire complaint being directed at the level of the rates maintained by certain defendants from the several International Boundary junctions to North Dakota and Minnesota destinations.

VI

That the rates assessed and collected by delivering carriers to destinations on the Great Northern and to points on the Farmers Grain and Shipping Company applied proportionally from Northgate (N. D. or Sask.), International Boundary (north of St. John, N. D.), International Boundary (north of Neche, N. D.) Noyes, Minnesota, or International Boundary (north of Noyes, Minn.) as published in Great Northern I. C. C. No. A-5681, G. F. O. No. 435-G, Item 31.

[fol. 26]

VII

That on shipments destined to points on the Minneapolis, St. Paul & Sault Ste. Marie Railway hereinafter called the Soo Line and to points on the Midland Continental, the rates from the border applied proportionally from Portal, N. D. and Noyes, Minn., as published in Soo Line I. C. C. 5359 and 6085, G. F. D. Nos. 29750 and 33660 respectively.

VIII

The rates on Canadian coal to points on the Northern Pacific in North Dakota and Minnesota from the border points, applied proportionally from Pembina, N. D., as published in N. P. I. C. C. No. 8116, Tariff No. 228-K, Item 30 and from Portal, N. D. and Noyes, Minn., combination rates as published in Soo Line I. C. C. No. 5359, G. F. D. No. 29750 and N. P. I. C. C. No. 8116, Tariff No. 228-K .

IX

That the routes of movement of the shipments which have already moved are described on the Appendices attached hereto and made a part hereof.

X

That the rates and charges assessed by defendants for the transportation of Lignite Coal from the various International Boundary junctions to destinations in North Dakota and Minnesota on the lines of defendants were and still are obviously unjust and unreasonable in violation of Section I of the Interstate Commerce Act when due consideration is given to the level of rates applicable on the same shipments from originating mines in Canada, up to the International Boundary junctions with the United States lines and, also, to the level of rates applicable on Lignite Coal in effect at the present time and at the time of the movement of the shipments described in the attached appendices, between points in North Dakota on either interstate or intrastate traffic or on interstate traffic from the several International Boundary junctions to points in Minnesota, as published and collected by defendants and as authorized in N. P. I. C. C. 8097 and N. P. I. C. C. 8365, Tariff No. 3881-A.

XI

That the rate factors applicable from the various International Boundary junctions to destinations on the lines of defendants herein have been increased since January 1, 1910, having been subjected to the general advances in rates made in 1918 and 1920.

[fol. 27]

XII

That the complainants herein paid and bore the freight charges for their respective shipments as specifically described in the attached Appendices.

XIII

That by reason of the facts stated in the foregoing paragraphs, complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are, unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act. That complainants have been and will be further damaged to the extent that the rates and charges assessed on shipments of Lignite Coal in carloads, originating at Canadian mines and applicable from the various International Boundary junctions specified in Paragraphs VI, VII and VIII to all destinations in North Dakota and Minnesota, exceeded or may exceed the rates which would have been applied to similar movements had they originated at the same International Boundary junctions.

Wherefore, complainants pray that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants (and each of them) to cease and desist from the aforesaid violations of said Act, and to establish and put in force and apply in future to the transportation of Lignite Coal in carloads originating at Canadian Mines from the various International Boundary junctions specified in paragraphs VI, VII and VIII to all destinations in North Dakota and Minnesota on the lines of defendants, in lieu of the rates and charges authorized by the tariffs referred to in paragraphs VI, VII and VIII, such other rates and charges as the Commission may deem reasonable and just and also to pay the complainants by way of reparation for the unlawful charges hereinbefore alleged such sum, as in view of the evidence to be adduced herein, the Commission shall determine that complainants are entitled to as an award of damages under the provisions of said Act for violation thereof, and for reparation upon all similar shipments which may move between the points involved during the pendency of this proceeding, down to basis of rates found reasonable by the Commission herein and that such other and further order or orders be made as the Commission may consider proper in the premises.

[fol. 28] Dated at Minneapolis, Minnesota, this 11th day of August, 1927.

Respectfully submitted by W. E. Keller, 1645 Hennepin Avenue., Minneapolis, Minnesota, for Alberta Coal Sales Company, Devils Lake N. D. and Piper-Howe Lumber Company, Minot, N. D.

Exhibit "L"

Interstate Commerce Commission

No. 19997

Alberta Coal Sales Company et al.

vs.

Canadian National Railways et al.

Submitted February 3, 1928. Decided May 7, 1928

Rates on lignite or bituminous coal, in carloads, from international-border points in North Dakota and Minnesota to destinations in those States, applicable to coal originating in the Province of Alberta, Canada, found unreasonable to the extent indicated. Reparation awarded.

Wesley E. Keller for complainants.

Leavitt R. Barker, John Junell, G. W. Traer, Sr., J. S. Gilbert, P. F. Scheunemann, and John A. Maher for various interveners.

Fletcher Rockwood, A. H. Lossow, M. L. Countryman, Jr., and R. J. Hagman for defendants.

Report of the Commission

By the Commission:

Complainants, defendants, and the Truax-Traer Coal Company, intervener, have filed exceptions to the report proposed by the examiner, and the parties have been heard in oral argument. Our conclusions differ from those recommended by the examiner.

[fol. 29] By complaint filed August 15, 1927, as amended, it is alleged that the rates on "lignite" coal, in carloads, from international-border points in North Dakota and Minnesota [1] to destinations in those states, applicable only to coal originating in Canada, have been and are unjust and unreasonable, in violation of section 1 of the Interstate Commerce Act. Complainants seek reasonable rates for the future and reparation on shipments delivered within the preceding statutory period and during the pendency of this proceeding. Rates are herein stated in amounts per ton of 2,000 pounds.

The Monarch Elevator Company, Minneapolis, Minn., a dealer in coal and other commodities, filed at the hearing a petition in intervention in support of the complaint seeking reparation on its own shipments made under the rates assailed. Various coal dock companies at Duluth, Minn., and Superior, Wis., intervened in opposition to the complaint, as did the Truax-Traer Coal Company, a miner and shipper of North Dakota lignite coal.

The rates in question were established in the latter part of 1922, at the solicitation of North Dakota interests, including the chairman of the then State fuel commission, a Canadian coal operator, and the owner of the complainant Alberta Coal Sales Company, who represented to the carriers that a strike in the eastern coal fields had curtailed the supply of coal through the Lake Superior docks and created an emergency in North Dakota. The rates were first published with a time limitation, but later the limitation was removed. With unimportant exceptions, the rates have not been increased since their establishment.

The rates are based upon distance scales, applied by 10-mile blocks for distances up to 400 miles, except that the Minneapolis, St. Paul & Sault Ste. Marie, otherwise known as the Soo Line, extends its scale to 500 miles. The latter scale is graduated beyond 400 miles to distances of 410, 430, 450, 470, and 500 miles. The scales of the three principal defendants, Great Northern, Northern Pacific, and Soo Line, are identical up to 400 miles. They range from $1 at

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[1] Portal, Northgate, International Boundary north of St. John, International Boundary north of Walhalla, Neche, and Pembina, all in North Dakota, and Noyes, Minn.

10 miles to $4.35 at 400, and the Soo Line's maximum, at 500 miles, is $5.10. To some destinations, however, it appears that the rates from the border are combinations upon an intermediate point or points and therefore are higher than if made upon the straight scale.

The coal originates at mines in the Province of Alberta, Canada. A recapitulation of certain of complainants' ex- [fol. 30] hibits indicates an average distance of 728 miles and an average rate of $3.70 from all the mines to all the border gateways from which the rates assailed apply. Various comparisons are made between the respective hauls and rates to and from the gateways. An instance is a rate of $3 from Kipp, Alberta, to Portal, N. Dak., a distance of 535 miles, whereas beyond the gateway the like rate applies for only 240 miles, or less than half the distance in Canada. Applying the illustrations to the recapitulation, the average rate of $3.70 for an average haul of 728 miles on the Canadian side would transport a ton of the coal approximately 330 miles after the boundary is crossed.

Complainints' principal comparisons are with the scales prescribed in Holmes & Hallowell Co. vs. G. N. Ry. Co., 69 I. C. C. 11, for interstate application to anthracite and bituminous coal from Lake Superior ports to points in Minnesota, North Dakota, and South Dakota, and in Lignite Coal from North Dakota, 126 I. C. C. 243, for interstate application to lignite coal from North Dakota mines to destinations in North Dakota, South Dakota, and Minnesota. The comparisons embody many variations and need not be reviewed in detail, but all disclose that the rates assailed are materially higher than both the anthracite and bituminous scales of the Holmes & Hallowell case, and much higher than the North Dakota interstate lignite scale. Among the exhibited instances are rates from the gateways computed to range roughly 120 per cent and upward of the Holmes & Hallowell bituminous scale and 115 per cent or more of the anthracite scale. Higher ranges over the North Dakota interstate lignite scale are shown, particularly for the longer hauls. As far as the rates assailed are made on the straight scales first above mentioned the ton-mile and car-mile earnings, the latter computed upon 33.4 tons, will range respectively from 10 cents and $3.34 for 10 miles to 1.09 and 36.3 cents for 400 miles. Complainants show an average loading of 33.4 tons. They submit some further comparisons, which we need not consider in view of our conclusion. Although no figures are shown, complainants put forward the further consideration that the interchange service at the border points manifestly entails less expense to the American carriers than does the terminal service at the Lake Superior docks or at the North Dakota lignite mines.

On their part defendants maintain, and submit tables to denote that the through combination rates from the Canadian mines to the destinations in Minnesota and North Dakota compare favorably with rates on coal for correspond- [fol. 31] ing distances from Montana, Wyoming, Minnesota, and Illinois to the same consuming territory. They contend, however, that the factors in question are in themselves reasonable. To support this contention they submit comparisons which disclose that for the shorter distances up to about 80 miles, the factors are lower than, and for greater distances compare in most instances not unfavorably with, rates on bituminous coal northbound and southbound from Sheridan and Kirby, Wyo., to stations in Wyoming and Montana. Some of the latter rates are indicated as having been found reasonable in Western Coal Rates, 80 I. C. C. 383. However, the operating conditions between Sheridan and Kirby, Wyo., and stations in Wyoming and Montana are more difficult than those from Duluth, Minn., and related Lake Superior ports to destinations in Minnesota, North Dakota and South Dakota. Western Coal Rates, 80 I. C. C. 383. It must also be borne in mind that the rates assailed are in the nature of proportional rates. A further exhibit contrasts the uniform scale upon which the rates assailed are based with the materially lower North Dakota interstate and intrastate "lignite" scales, with the materially higher "bituminous" general distance tariff scale applying between Minnesota, North Dakota, and South Dakota, and with the general distance tariff scale applicable to bituminous intrastate in North Dakota.

Defendants make the further point that the movement of the coal from the international boundary is largely over branch lines of the defendants, in contrast with the main-line hauls westward from the Lake Superior docks. It is not true of Portal, which is on the Soo Line's route to the Pacific coast. They also stress the small volume of movement, illustrated of record, in comparison with the movement of coal from the Lake Superior docks and of North Dakota lignite.

The rates in question are published for application to "bituminous" coal, whereas the Canadian coal to which they are applied is asserted by complainants to be, and is billed for shipment as, "lignite". Defendants maintain that is bituminous. The record does not afford a satisfactory guide for distinguishing between the grades for transportation purposes. Webster's New International Dictionary defines "lignite" as a variety intermediate between "peat" and "bituminous" coal, especially one in which the fibre of the original wood is distinct, and this is confirmed by the record. The evidence is to the effect that the Canadian coal is of better quality than the North Dakota lignite. Price quotations shown of record are $2 per ton for [fol. 32] North Dakota lump and $4.20 to $5.50 for the Canadian lump at the mines. Both kinds will air-slack upon exposure to the weather, however, said to be a characteristic of lignite, and the Canadian coal is admitted to this country duty free pursuant to a reciprocal arrangement between the two governments respecting "lignite", whereas "bituminous" coal is subject to a duty. There is no section 6 issue in the case.

Objection to the relief sought is voiced by the intervener handling the North Dakota lignite as encouraging the competition of the Canadian coal, and by interveners handling the Lake Superior dock coal on the ground that the result will be unduly prejudicial to them. To the first objection we can only reply that we can not for that reason properly deny relief from unlawful freight rates, and to the second, that nothing is shown of record whereby undue prejudice and preference can be predicated of the relationship that will result from a reduction of the rates assailed to a reasonable level.

In determining the particular rates prescribed in Lignite Coal from North Dakota, supra, we took into account the inferior quality of the coal and gave consideration to the consequent value of the service to the shipper and the level of rates the traffic could bear without curtailment of the movement. In the Holmes & Hallowell case, on the other hand while dealing with higher-grade coals, bituminous and anthracite, we projected scales which took into account the fact that the shorter hauls were in a territory of denser population and tonnage and that the longer hauls reached into a territory of relatively sparse population and small tonnage. Therefore, while we are persuaded by the record that the rates here in question are on an unreasonably high level, we are of opinion that neither the North Dakota lignite nor the Holmes & Hallowell bituminous scale represents the appropriate measure of maximum reasonable rates. For application to hauls primarily and principally in a territory of relatively light tonnage, in part over branch lines, and to coal of the grade and value of the Canadian product the scale should begin on a somewhat higher level than the Holmes & Hallowell bituminous scale and grade down to its level at 500 miles.

Upon all the facts of record we find that, as applied to the Canadian coal to which this proceeding relates and for both single-line and joint-line hauls, the rates assailed were, are, and for the future will be unjust and unreasonable to the extent that they have exceeded or may exceed the rates per ton of 2,000 pounds set forth in the subjoined table for [fol. 33] the respective distances shown and which we find to be the maximum reasonable rates for application to the transportation of the traffic in question:

10 miles and under	$0.75
20 miles and over 10 miles	0.85
30 " " " 20 "	0.95
40 " " " 30 "	1.05
50 " " " 40 "	1.15
60 " " " 50 "	1.25
70 " " " 60 "	1.35
80 " " " 70 "	1.44
90 " " " 80 "	1.52
100 " " " 90 "	1.60
110 " " " 100 "	1.68
120 " " " 110 "	1.76
130 " " " 120 "	1.84
140 " " " 130 "	1.92
150 " " " 140 "	2.00
160 " " " 150 "	2.06
170 " " " 160 "	2.12
180 " " " 170 "	2.18
190 " " " 180 "	2.24
200 " " " 190 "	2.30
210 " " " 200 "	2.36
220 " " " 210 "	2.42

230	"	"	"	220	"	2.48
240	"	"	"	230	"	2.54
250	"	"	"	240	"	2.60
260	"	"	"	250	"	2.66
270	"	"	"	260	"	2.72
280	"	"	"	270	"	2.78
290	"	"	"	280	"	2.84
300	"	"	"	290	"	2.90
310	"	"	"	300	"	2.96
320	"	"	"	310	"	3.01
330	"	"	"	320	"	3.07
340	"	"	"	330	"	3.12
350	"	"	"	340	"	3.18
360	"	"	"	350	"	3.23
370	"	"	"	360	"	3.29
380	"	"	"	370	"	3.34
390	"	"	"	380	"	3.40
400	"	"	"	390	"	3.45
410	"	"	"	400	"	3.50
420	"	"	"	410	"	3.55
430	"	"	"	420	"	3.60
440	"	"	"	430	"	3.65
450	"	"	"	440	"	3.70
460	"	"	"	450	"	3.75
470	"	"	"	460	"	3.80
480	"	"	"	470	"	3.85
490	"	"	"	480	"	3.90
500	"	"	"	490	"	3.95

[fol. 34] We further find that complainants and the Monarch Elevator Company, intervener, made shipments under the rates herein found unreasonable and paid or bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued or would accrue at the rates herein found reasonable; and that they are respectively entitled to reparation in those amounts, with interest. They should comply with Rule V of the Rules of Practice. Shipments delivered since the hearing may be included and proof concerning payment or bearing of the charges may be submitted by affidavit, but if defendants decline to accept proof in that form the matter may be brought to our further attention by petition for further hearing respecting such shipments.

When publishing the rates herein prescribed defendants will be expected to make them applicable to the kind of coal from the Canadian mines to which they are to be applied.

An appropriate order will be entered.

Brainerd, Commissioner, dissenting in part:

This proceeding involves rates on bituminous coal originating in the Province of Alberta and shipped over the lines of the defendant carriers to points in North Dakota and Minnesota. Through rates were constructed by combination rates to and from the International Border. The rates from the border points to destinations mentioned are found unreasonable and reparation is awarded, although there is no evidence that the through rates are unreasonable. On the contrary, they are affirmatively shown to be reasonable. A through rate may be reasonable although one of its elements is not. It is immaterial that the through rate be a combination of locals or proportionals rather than a joint rate. In the ascertainment of damages, the Commission has jurisdiction to determine the reasonableness of the through rate. The through rate being reasonable, no damage can have resulted therefrom to the complainant. News Syndicate Co. vs. N. Y. C. R. R. Co. et al., 275 U. S. 179, 187.

I therefore dissent from the award of reparation.

I am authorized to say that Commissioner Woodlock concurs in this expression of dissent.

Porter, Commissioner, dissenting:

In 1922 when eastern coal miners were on strike and it became difficult to secure coal to supply the northwestern section of our country, coal dealers and miners petitioned [fol. 35] the American carriers to establish a basis of proportional rates on coal from Canada. Temporary rates were established, their expiration date was later extended and still later removed entirely leaving the rates in effect. For the past six years this coal has moved into North Dakota and Minnesota in competition with the better coal from the head-of-the lakes and the cheaper lignite from mines in North Dakota. The majority find that this basis of rates was, for the two years prior to the date of filing the complaint, and for the future will be unreasonable in amounts for the different mileage blocks varying from 30 cents to 115 cents per ton.

The assailed rates are higher that the so-called Holmes & Hallowell scale and are considerably higher than interstate rates on North Dakota lignite fixed by us in Lignite Coal from North Dakota, 126 I. C. C. 243. The majority concede, as they must, that "neither the North Dakota lignite nor the Holmes and Hallowell bituminous scale represents the appropriate measure of maximum reasonable rates." What rates, then, do provide a standard?

It seems to me that defendants' comparison of these proportional rates with those applicable on coal from Sheridan and Kirby, Wyo., affords a fair and reasonable guide. The record shows that the assailed rates for 2-mile blocks up to 100 miles and 50-mile blocks up to 300 miles, average 215 cents per ton, as compared with similar averages from Kirby and Sheridan, northbound and southbound, respectively, of 210.9 cents and 219.4 cents. The rates here fixed by the majority will compare with northbound rates from Sheridan and Kirby as follows:

Rates

Miles	From Sheridan and Kirby (Northbound)	Here prescribed as reasonable	Assailed
20	97.5	85	115
40	157.5	105	130
60	157.5	125	155
80	170	144	165
100	190	160	190
150	197.5	200	230
200	281*	230	275
250	309.5*	260	315
300	338*	290	360

[fol. 36] It will thus be seen that not only do the assailed rates compare favorably with the rates from Sheridan and Kirby but the rates prescribed will be considerably lower, notwithstanding some of the Sheridan and Kirby rates have had our approval.

The complaint should be dismissed.

---

* Rates found reasonable by us in Western Coal Rates, 80 I. C. C. 383.

Commissioner Taylor desires to be shown as joining in this dissent.

STIPULATION OF COUNSEL APPROVING BILL OF EXCEPTIONS

It is hereby stipulated that the foregoing, consisting of 16 pages of typewritten matter, constitute a full, true and correct transcript of all the evidence introduced and of all motions, rulings, and orders made and of all the exceptions taken and allowed upon the trial of the foregoing action, and that the same is in accordance with the truth and may without further notice be settled, allowed and certified as the Bill of Exceptions in said action and made a part of the record herein.

Dated this 25th day of September, 1933.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff. R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

APPROVAL OF BILL OF EXCEPTIONS BY DISTRICT JUDGE

Thereupon and within the time allowed the defendant duly tendered this Bill of Exceptions herein, which having been seen and examined by the Court and counsel, and counsel having consented thereto, and it appearing to the Court that the same contains all the evidence introduced and all motions, rulings and orders made, and all exceptions taken and allowed upon the trial of the foregoing action, is hereby allowed, approved, signed, sealed and ordered to be filed and made a part of the record in this cause this 27th day of September, 1933.

By the Court:

Matthew M. Joyce, District Judge.

[fol. 37] [File endorsement omitted.]

Citation in usual form, showing service on Stanley B. Houck and Ormie C. Lance, filed Sept. 28, 1933, omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Sept. 25, 1933

To the Clerk of the above entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit under the appeal heretofore taken by the defendant, and include in said transcript the following:

1. Complaint, including Exhibit "A" attached thereto but omitting Exhibit "B" attached thereto.
2. Answer.
3. Reply.
4. Stipulation Waiving Jury.
5. Clerk's Record of Trial.
6. Opinion of District Court.
7. Judgment.
8. Bill of Exceptions with Stipulation and Order Settling the Same.
9. Assignment of Errors.
10. Prayer for Reversal.
11. Petition for Appeal.
12. Waiver of Cost and Supersedeas Bond and Consent to Stay.
13. Order Allowing Appeal.
14. Citation on Appeal.
15. Election as to Printing.
16. This Præcipe.
17. Consent to Contents of Record.
18. Clerk's Certificate to Transcript.

Said transcript to be prepared as required by law and by the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated September 25th, 1933.

[fols. 39 & 40] Consent to Contents of Record

Plaintiff, by and through its attorneys of record, hereby admits service of the above Præcipe, consents thereto, and agrees that the transcript requested thereby contains all the records in this case which are material to the determination on the merits of the appeal heretofore taken by defendant.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff.

Dated September 25th, 1933.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING OF RECORD—Filed Sept. 28, 1933

The defendant in the above entitled case hereby elects to take and file in the United States Circuit Court of Appeals for the Eighth Circuit a transcript of the record herein to be printed under the supervision of the Clerk of said Court under its rules.

Dated this 25th day of September, 1933.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] Appearances of counsel omitted in printing.

[fol. 42] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—May 10, 1934

This cause having been called for hearing in its regular order, argument was commenced by Mr. J. P. Plunkett for appellant, continued by Mr. Stanley B. Houck for appellee, and concluded by Mr. J. P. Plunkett for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

May Term, A. D. 1934

No. 9871

GREAT NORTHERN RAILWAY COMPANY, Appellant,

vs.

P. B. SULLIVAN, doing business as ALBERTA COAL SALES COMPANY, Appellee

Appeal from the District Court of the United States for the District of Minnesota

Mr. J. P. Plunkett (Mr. R. J. Hagman was with him on the brief), for appellant.

Mr. Stanley B. Houck (Mr. Ormie C. Lance was with him on the brief), for appellee.

Before Gardner, Woodrough, and Van Valkenburgh, Circuit Judges.

OPINION—September 4, 1934

GARDNER, Circuit Judge, delivered the opinion of the court:

Appellee as plaintiff, brought this action against appellant to recover damages by way of reparation in the sum of $3990.20, which amount had been awarded him by an order of the Interstate Commerce Commission in a proceeding entitled Alberta Coal Sales Company et al., vs. Canadian National Railways et al., Docket No. 19997. Appellee was one of the complainants in that proceeding.

[fol. 44] Appellant is a common carrier engaged in the transportation of property, including property originating at points on the Canadian Pacific Railway Company in Canada, and it was one of the defendants in said proceeding before the Interstate Commerce Commission.

We shall refer to the parties as they were designated in the lower court.

During the years 1925 to 1928, inclusive, plaintiff shipped numerous carloads of coal from points originating in the Province of Alberta, Canada, on the line of the Canadian Pacific Railway Company, to points on defendant's line of railroad in the State of North Dakota. These shipments moved from points of origin to destination on bills of lading executed at points of origin. The freight charges collected were computed by the use of a rate made up of two factors, one a proportional rate from points of origin to the international boundary, applicable only to coal destined to points beyond the boundary, and the other, a proportional rate from the international boundary to destination points in North Dakota, applicable only to coal shipments originating in Canada. The entire freight charges as published in these applicable tariffs were collected by defendant, and it in turn accounted to the Canadian line for the proportion of the charges due it.

On complaint of plaintiff alleging that the rates and charges collected for that portion of the haul from the international boundary to destination in North Dakota were unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, the Interstate Commerce Commission, in the proceeding above referred to, found these rates to be unjust, unreasonable, and excessive to the extent that they exceeded a scale of rates set forth in the decision of the Commission, and the Commission thereupon entered an order requiring defendant to pay plaintiff damages by way of reparation in the sum of $3990.20, the damages being calculated on the basis of the difference between the published rates as collected by the defendant and the scale of rates found by the Commission to be the maximum reasonable rates applicable to the transportation of the traffic in question. Defendant having refused to comply with this order, plaintiff brought this action to recover judgment for the amount of the award, together with interest thereon.

[fol. 45] On this appeal it is contended by defendant that (1) plaintiff suffered no recoverable damage in consequence of the violation of the Interstate Commerce Act, because it was neither charged nor proven that the entire through-rate was unreasonable; and (2) that the mere fact that the rates from the international boundary, as fixed by the published tariff of defendant, were found to be unreasonable and unjust, did not authorize the Commission to award damages for past violation, but only warranted it to forbid the use of the rate in the future because there was no finding that the through-rate was unreasonable.

As has been observed, defendant's rate from the international boundary was a proportional one, made applicable only to coal shipments originating in Canada. It was defendant's duty to publish and charge a just and reasonable rate for the transportation of plaintiff's freight from the international boundary to points in the United States. Section 1 of the Interstate Commerce Act provides that it shall apply to common carriers engaged in the transportation of property wholly by railroad from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States. The Interstate Commerce Act does not empower the Commission to prescribe or regulate a joint through international rate, but it has the power to regulate the rate over that part of the transportation which takes place within the United States. Interstate Commerce Act, 24 Stat. 379, Title 49 U. S. C. A. Sec. 1, subdivisions (1), (2), and (5), and Sec. 6, subdivisions (1), (7), and (8).

The evidence introduced before the Commission is not before us, but no attack is made upon the findings of the Commission that the rates as published and charged by the defendant from the international boundary line were unreasonable and unjust. The plaintiff, therefore, violated this provision of the Interstate Commerce Act. While not disputing this violation of the Act, as found by the Commission, defendant contends that it was not only necessary to prove that it had violated the Act, but that the plaintiff had been damaged by reason of that violation.

In collecting the exorbitant freight charges on the traffic in question, defendant committed a tort, making it liable for any damage resulting therefrom, but defendant ingeniously argues that inasmuch as the Commission did not [fol. 46] find that the entire through-rate was excessive or exorbitant, it cannot be said that plaintiff has been injured. The tariff as published, established the rate in question as a proportional rate. It was applicable only as a part of the through-rate, and as such it was found to be unjust, unreasonable, and excessive. In other words, the Commission considered this rate not as an independent rate from the international boundary to the point of destination, but as a part of the international through-rate from point of origin to point of destination. If, as argued by defendant, the rate from the point of origin to the international boundary may have been very low, still we must assume that the Commission considered the rate in question as a part of the through-rate.

The contention now made may well have been urged before the Commission, and we may presume that it was so urged. But notwithstanding that fact, the Commission found the tariff published and the rate charged and collected by the defendant pursuant thereto, unreasonable and excessive. This is not a case in which the defendant has violated the Commerce Act by failure to publish a rate from the international boundary, nor is it a case in which it has violated the Act by participating in an unreasonable joint through international rate, but it has committed a tort because it has collected the exorbitant and unreasonable rate from the international boundary as published in its tariff. Lewis, etc. Co. v. Southern Pacific Co., 283 U. S. 654; News Syndicate Co. v. New York Central R. Co., 275 U. S. 179.

This violation of the Act by the defendant has resulted in damage to the plaintiff which is measured by the difference between the unjust and unreasonable charge exacted and the maximum rate found by the Interstate Commerce Commission to be reasonable and just, with interest upon the amount of such difference. Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U. S. 217.

The judgment appealed from is therefore affirmed.

[fol. 47] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 9871

GREAT NORTHERN RAILWAY COMPANY, Appellant,

vs.

P. B. SULLIVAN, Doing Business as ALBERTA COAL SALES COMPANY

JUDGMENT—September 5, 1934

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that P. B. Sullivan, doing business as Alberta Coal Sales Company, have and recover against the Great Northern Railway Company the sum of Twenty Dollars for his costs herein and have execution therefor.

September 5, 1934.

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR ORDER STAYING ISSUANCE OF MANDATE—Filed Oct. 3, 1934

To the Honorable Judges of this Court:

Your petitioner, Great Northern Railway Company, respectfully presents this, its application for an order staying the issuance of a mandate of this Court filed September 4, 1934, and in support thereof states that your petitioner, the Appellant herein, is preparing Petition for Writ of Certiorari and will file the same on or before the expiration of three months from the date of judgment of this Court herein.

That your petitioner is arranging with the Clerk of this Court for the preparation of transcript for the Supreme Court of the United States.

Your petitioner further respectfully submits herewith a stipulation of Counsel for both parties hereto consenting to the execution of this order.

Wherefore, your petitioner respectfully prays that an order be issued by this Court staying the issuance of mandate herein pending final disposition of this cause in the Supreme Court of the United States of America.

Respectfully submitted, J. P. Punkett, R. J. Hagman, Counsel for Petitioner and Appellant.

Dated October 2, 1934.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS

STIPULATION FOR ORDER STAYING ISSUANCE OF MANDATE—Filed Oct. 3, 1934

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that whereas Appellant is applying to the United States Supreme Court for a Writ of Certiorari, that an order may be issued by this Court staying issuance of Mandate herein pending the final disposition of this matter in the Supreme Court of the United States.

J. P. Plunkett, R. J. Hagman, Counsel for Appellant. Stanley B. Houck, Counsel for Appellee.

Dated October 2, 1934.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—October 5, 1934

On consideration of Motion of Counsel for Petitioner and Appellant in the above entitled cause, and good cause therefor having been shown, and stipulation of both parties to this cause consenting to this order having been filed with this Court.

It is hereby ordered, that the issuance of mandate herein be stayed pending the final disposition of this matter in the Supreme Court of the United States of America on condition that a petition for Writ of Certiorari be duly filed herein on or before the expiration of three months from September 5, 1934, the date of judgment herein.

Dated October 5, 1934.

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,127. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 499. Great Northern Railway Company, Petitioner, vs. P. B. Sullivan, doing business as Alberta Coal Sales Company. Petition for a writ of certiorari and exhibit thereto. Filed October 26, 1934. File No. 499, O. T., 1934.

FILE COPY

OCT 26 1

CHARLES ELMORE

Supreme Court of the United States

October Term, 1931.

No. 499

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

v.

P. B. SULLIVAN, doing business as ALBERTA COAL SALES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

R. J. HAGMAN,
J. P. PLUNKETT,
Counsel for Petitioner.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

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Supreme Court of the United States

October Term, 1934.

No. ———

Great Northern Railway Company,
Petitioner,
v.
P. B. Sullivan, doing business as Alberta Coal Sales Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The petition of the Great Northern Railway Company respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This proceeding involves the question of what is the correct measure of damages to be applied in the case of a shipment from a point in Canada to a point in the United States where the Interstate Commerce Commission has found that one factor of the through rate, viz., the proportional rate applicable from the international boundary to the destination in the United States was unjust and unreasonable. The precise question is: Where the Interstate Commerce Commission has found that a proportional rate applicable from the international boundary to the destination in the United States was unjust and unreasonable but has made no finding with respect to the reasonableness of the through rate from the origin in Canada to the destination in the United States was the Commission correct in awarding damages to the shipper by way of reparation measured by the difference between such proportional rate and the maximum proportional rate found by the Commission to be just and reasonable?

The respondent, engaged in wholesaling coal, brought an action in the District Court of the United States for the District of Minnesota against the petitioner, Great Northern Railway Company, to recover the sum of $3,990.20 awarded by the Interstate Commerce Commission as reparation on numerous carload shipments of coal from points of origin in the Province of Alberta, Canada, to destinations in the State of North Dakota. These shipments moved under through bills of lading executed at the Alberta points of origin covering the movement to the destinations in North Dakota. The freight charges collected by the petitioner at the several destinations were computed by the use of through rates made up of two factors, one a so-called proportional rate from the point of origin in Alberta to the international boundary applicable only on coal destined to points south of the boundary, the other a proportional rate from the international boundary to the destination in North Dakota applicable only on coal originating north of the boundary. The petitioner paid over to its connecting carriers operating north of the boundary that portion of the freight charges applicable to that portion of the haul (Rec. 20).

In the proceeding before the Interstate Commerce Commission the respondent alleged only that the proportional rates applicable from the international boundary to the destinations in North Dakota were unjust and unreasonable. No complaint was made respecting the proportional rates from the origins in Alberta to the international boundary nor the through rates from the origins in Alberta to the destinations in North Dakota that resulted from the combination of these proportional rates (Rec. 24-28). The Commission in its report (142 I. C. C. 543) found, with Commissioners Brainerd, Woodlock, Porter and Taylor dissenting, that the proportional rates from the international boundary to the destinations in North Dakota were unreasonable to the extent that they exceeded a scale of rates set forth in the decision, and awarded reparation measured by the difference between such proportional rates charged and those set forth in said scale. The Commission made no finding with respect to the reasonableness of the proportional rates from the origins in Alberta to the international boundary nor of the resulting through rates from such origins to the North Dakota destinations (Rec. 28-36).

At the trial in the District Court a jury was waived (Rec. 9) and the case was submitted on a stipulation of facts (Rec. 18). The District Court entered judgment in favor of the respondent for the amount of the reparation awarded by the Commission with interest (Rec. 10-14).

In *News Syndicate Co. v. New York Central R. R. Co.*, 275 U. S. 179, where the facts were very much the same, the Supreme Court said:

> "Had the through rate been just and reasonable no damages would have resulted to the plaintiff in error."

This was called to the attention of the trial court which said:

> "So that we have a service from the border down, over which the Commission possesses authority to determine

> the reasonableness of the rates therefor, and that is what was done in this case; and while the Supreme Court in News Syndicate vs. New York Central, 275 U. S. 179, uses the language, 'had the through rate been just and reasonable, no damages would have resulted to plaintiff in error', it does not seem to me to be in conflict with the finding here, because in that case the defendant had failed to publish charges from point of origin to the international boundary and from the boundary point to destination. There might be no way to determine as to a violation of the Act except by determining the reasonableness of the through charge. The News Syndicate case also states with reference to the application of Section 16:
>
> 'And it was the duty of the Commission to ascertain the damages sustained. It is obvious that in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.'
>
> I am of the opinion that the duty existed on the part of the carrier to have its proportional rate from the border to destination just and reasonable, and if they failed so to do the one aggrieved could avail himself of the remedies provided by the Act. In my judgment the Commission had full authority to determine the reasonableness of the rate from the border to destination. Such a rate must of necessity under the law be published. It constituted a tariff charge which the Commission has found to be unreasonable and for which wrong, it has, as I see it, properly awarded reparation, there being a sufficient basis for such an award and a proper foundation existing for the maintenance of the proceedings herein." (Rec. 12-13.)

Upon appeal the judgment was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit which did not discuss the statement quoted from the *News Syndicate case* but held that the Commission had considered the rates attacked not as independent rates from the international boundary to the North Dakota destinations but as part of the international through rates from the points of origin to the points of destination; that the petitioner committed a tort because it collected the unjust and unreasonable proportional rate; and consequently respondent's damages were properly measured by the difference between the proportional rates charged and those found reasonable by the Commission (Rec. 42-45).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has adopted a measure of damages in this case which is inconsistent with previous decisions of the Supreme Court. In *L. & N. R. R. v. Sloss-Sheffield Co.*, 269 U. S. 217, the Supreme Court held that the measure of damages for excessive freight charges under Section 1 of the Act to Regulate Commerce was the amount of the excess exacted. The Circuit Court of Appeals has extended this rule so as to apply it in a case where only one element or factor of a through rate is found unreasonable and has adopted as the measure of damages in such a case the excess of such factor over a reasonable factor, notwithstanding the fact that the Supreme Court has said in at least three cases that a through rate may be reasonable although one or more of the factors of which it is composed be unreasonable. *U. S. v. Abilene & Southern Ry. Co.*, 265 U. S. 274; *L. & N. R. R. v. Sloss-Sheffield Co., supra*, and *News Syndicate Co. v. New York Central R. R., supra*.

2. This precise question has never been determined by the Supreme Court. It is important to all railroads and shippers in the United States and does not involve merely the small sum sued for in this proceeding. Nor is it confined to international shipments but may arise in connection with any shipment, national or international, moving on through rates composed

of combinations of local or proportional rates. Other similar cases are pending before the courts the disposition of which will be governed by the case at bar.* The question arises constantly in cases before the Interstate Commerce Commission. We believe that it is an important question of Federal law affecting the Commission's administration of the Interstate Commerce Act and the rights of interstate shippers and carriers generally.

3. At the conclusion of the case your petitioner moved the trial court for judgment in favor of the defendant on the ground that there was no substantial evidence of record to support any other conclusion than that defendant was entitled to judgment (Rec. 23). This motion was denied (Rec. 10-11). The Circuit Court of Appeals failed to correct this error (Rec. 12-15).

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 9871, Great Northern Railway Company, Appellant, vs. P. B. Sullivan, Doing Business as Alberta Coal Sales Company, Appellee, and that said decree of the Circuit Court of Appeals of the United States for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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*P. B. Sullivan v. Great Northern Ry. Co., and Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

P. B. Sullivan v. Northern Pacific Ry. Co.

P. B. Sullivan v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

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P. B. Sullivan v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. and Midland Continental R. R. Co.

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Monarch Elevator Co. v. Great Northern Ry. Co.

GREAT NORTHERN RAILWAY COMPANY,
By R. J. HAGMAN,
J. P. PLUNKETT,
Counsel for Petitioner.

Supreme Court of the United States

October Term, 1934.

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

v.

P. B. SULLIVAN, doing business as ALBERTA COAL SALES COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the District of Minnesota, Third Division, has not been officially reported but it found at page 11 of the Record.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit dated September 4, 1934, has not been officially reported to this date but is found on pages 42 to 45 of the Record.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on September 5, 1934 (Rec. p. 45), less than three months prior to the date of application for this writ of certiorari (U. S. Code, Title 28, Sec. 350).

The jurisdiction of the Supreme Court is invoked under paragraph (a) of Section 240 of the Judicial Code, as amended and re-enacted by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

III.

STATEMENT OF THE CASE.

A statement of the case has been given in the petition under the heading "Summary Statement of the Matter Involved."

IV.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in finding and holding that the respondent had suffered damages measured by the difference between the proportional rates from the international boundary to the North Dakota destinations applied by the petitioner and those found reasonable by the Commission.

2. The Circuit Court of Appeals erred in finding and holding that in finding unreasonable the proportional rates from the international boundary to the North Dakota destinations the Commission, in effect, found unreasonable the through rate from the Alberta origins to the North Dakota destinations.

3. The Circuit Court of Appeals erred in entering judgment against the petitioner and in favor of the respondent.

V.

ARGUMENT.

A.

The Respondent Has Failed to Prove That He Sustained any Damages in Consequence of the Application of the Unreasonable Proportional Rate.

Section 8 of the Interstate Commerce Act provides:

> "In case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby *for the full amount of damages sustained in consequence* of any such violation of the provisions of this Act * * *." (Italics added.)

Therefore in order to recover damages from a carrier under the Act one must prove not only the violation of some provision of the Act by the carrier but also that he has suffered pecuniary damage in consequence of such violation. *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447; *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184; *Davis v. Portland Seed Co.*, 264 U. S. 403.

It is not contended by the respondent that he made any specific proof of pecuniary loss or that the Commission made any finding that the through rate was unreasonable nor is it contended that the through rate was in fact unreasonable. The respondent contends and the Circuit Court of Appeals has held that a finding by the Commission that one factor of the through rate was unreasonable is sufficient to support an award of damages measured by the difference between such unreasonable factor and the factor found to be reasonable, citing in support of this holding the case of *Louisville & Nashville R. R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217.

In that case the shipper attacked the through rate from the point of origin to the destination and the Commission found it to have been unreasonable in violation of Section 1 of the Act. The Supreme Court held that the damages sustained were measured by the amount of the excess exacted. The question decided in that case was quite a different one from that before us here. It is self-evident, of course, that if the total freight charges exacted from a shipper for the transportation of goods from a point of origin to destination were unreasonable the shipper would sustain damages measured by the amount of the excess exacted. His injury would be the direct result of and would be in direct proportion to the excess exacted. If the excess were great his injury would be great; if the excess were slight his injury would be slight.

But it does not follow from this that if the total freight charges exacted for the transportation of goods from a point of origin to destination were *not* unreasonable the shipper would nevertheless sustain damages if one of the factors used to compute the through rate were unreasonable nor that such damages should be measured by the amount of the excess of such factor over a reasonable factor. The factors that make up a through rate of this kind merely represent the division of such through rate among the participating carriers. *Morrell & Co. v. N. Y. C. R. R.*, 104 I. C. C. 104, 128. But the division of a rate among the participating carriers is a matter that in no way concerns the shipper. For one reason or another one carrier may take less and another may take more than what would seem to be a reasonable proportion of the through rate. But a shipper is not injured because one carrier may receive more than a reasonable proportion of the through rate. His only interest is that the rate be reasonable as a whole. It may be unreasonable although each of the factors of which it is constructed is reasonable. It may be reasonable although some of the factors are unreasonable. *Louisville & Nashville R. R. v. Sloss-Sheffield Co., supra.*

The Commission has recognized this principle and applied it consistently to cases where the entire transportation is within the United States. In *Stevens Grocer Co. v. St. L. I. M. & S. Ry. Co.*, 42 I. C. C. 396, 398, the Commission said:

> "When the through rate or charge is made up of separately established rates or charges, applicable to the through business, the through rate or charge must be attacked as violative of the act, although the violation may be believed to be occasioned by a particular factor or factors thereof; in such case the complainant should be prepared at the hearing to prove the unlawfulness of the through rate itself and that this is due to a particular factor or factors."

In *Cairo Board of Trade v. C. C. C. & St. L. Ry. Co.*, 46 I. C. C. 343, the Commission modified its decision in the Stevens Grocer Co. case to the extent of holding that the Commission might find that a proportional rate was unreasonable in a case where the through rate was not attacked but it laid down the rule that in determining whether a shipper had been damaged the Commission must consider the total through charges, saying on page 350:

> "The rule is stated in the *Stevens Grocer Co. Case* more broadly than it should be. In determining whether or not a complainant has been damaged by the exaction of unreasonable or unduly preferential reshipping (proportional) rates the total through charges paid from point of origin must be considered."

Again in the same case it is said, page 351:

> "An excessive reshipping (proportional) rate might produce a reasonable through charge in connection with an unduly low inbound rate and vice versa."

In *Atlantic Terra Cotta Co. v. A. & W. P. Ry. Co.*, 151 I. C. C. 45, the Commission said on page 52:

> "In *Cairo Board of Trade v. C. C. C. & St. L. Ry. Co.*, 46 I. C. C. 343, 350, we announced a principle, which has since been consistently followed, that where a through rate is made up of separately established components we may pass upon the lawfulness of any one of the components independent of the others for the future, but where the matter of reparation on past shipments is concerned the total through charges must be considered."

The Supreme Court has recognized this principle in a footnote on page 283 of *U. S. v. Abilene & Southern Ry. Co.*, 265 U. S. 274, where in discussing the parties necessary to a division case the court said:

> "The case is wholly unlike those in which it is held that where a shipper attacks a through rate all participating carriers must be made respondents, even though the through rate is made up of separately established elements. The complainant may wish to direct his attack only against one of these. But it is only the through rate which is in issue. It may be reasonable although one of its elements is not. It must stand or fall as an entirety. See *Stevens Grocer Co. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 42 I. C. C. 396, 398; *McDavitt Bros. v. St. Louis, Brownsville & Mexico Ry. Co.*, 43 I. C. C. 695; *LaCrosse Shippers' Assoc. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 43 I. C. C. 605, 607; *E. I. Dupont de Nemours Powder Co. v. Pennsylvania R. R. Co.*, 43 I. C. C. 227. Compare *Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 364, 371; *Indianapolis Chamber of Commerce v. Cleveland, Cincinnati, Chicago & St.*

Louis Ry. Co., 46 I. C. C. 547, 556; *Johnson & Son v. St. Louis-San Francisco Ry. Co.*, 51 I. C. C. 518, 520."

While the precise question here under consideration has never been decided by the Supreme Court it is our opinion that that court recognized the principle laid down by the Commission in the *Cairo Board of Trade case, supra*, and for which we are contending here and applied it to international shipments in *News Syndicate Co. v. N. Y. C. R. R.*, 275 U. S. 179. In that case numerous carload shipments of newsprint paper had been made from Thorold, Ontario, to New York City at a joint through rate from the point of origin to destination which the Commission found was unreasonable. The carriers participating in that part of the transportation within the United States did not publish a rate on this commodity from the international boundary to New York City. The Commission awarded reparation measured by the difference between the charges exacted for the through transportation and those that would have accrued at the rates found reasonable by the Commission. In a suit brought in the District Court to enforce that award the District Court sustained a demurrer to the complaint on the ground that it failed to state a cause of action, holding that the Commission's order was void for want of jurisdiction because it dealt solely with charges for transportation from a point in Canada to a point in the United States. Upon appeal to the Circuit Court of Appeals that court certified certain questions to the Supreme Court, among them being the following:

> "1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United

> States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?"

The answer was "Yes, for the ascertainment of damages".

In discussing this question the court said:

> "As to question 1.—The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Secs. 1 (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Secs. 1 (5), Sec. 4 (1) and 7. They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained *in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error.* Its right to reparation does not depend upon the amounts retained by defenants in error pursuant to agreed divisions. *Louisville & Nashville R. R. v. Sloss-Sheffield Co.*, 269 U. S. 217, 231. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this Act for a violation thereof.' Sec. 16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted." (Italics added.)

The analogy between that case and the case at bar is very close. Both involved shipments from points in Canada to points in the United States. In both cases it was the duty of the American carriers to establish just and reasonable rates from the international boundary to the American destination. In both cases the American carriers failed in that duty. In the *News Syndicate case* no rate at all was published; in the case at bar an unreasonable rate. In both cases Section 8 of the Interstate Commerce Act made the American carriers "liable for damages sustained in consequence of such failure." How should those damages be measured? In the *News Syndicate case* the Supreme Court said: "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error." The measure of damages, therefore, was the extent to which the through rate was unreasonable. Should the analogy between these cases stop here? Is there any reason why the measure of damages which the Supreme Court laid down in the *News Syndicate case* should not apply to the case at bar? We can think of none. The only difference between the facts of the two cases is that in the *News Syndicate case* no rate at all was published from the boundary whereas in this case an unreasonable rate was published. Is this difference sufficient to justify a different measure of damages? The decision in the *News Syndicate case* indicates that the Supreme Court did not measure the damages by the through rate because no rate had been published from the boundary but because that was the proper measure of damages. "Had the through rate been just and reasonable, no damage would have resulted to plaintiff in error". We submit that the same principle should be applied to the case at bar. If the through rate in this case was just and reasonable no damages resulted to the respondent.

As previously stated the Commission in this case made no finding with respect to the reasonableness of the through rate but awarded damages measured by the difference between the factor from the international boundary to destination and what it found to be a reasonable factor between such points. Since the Commission used an improper measure of damages in this case and failed to find the facts essential to the application of a proper measure of damages and since such a finding can only be made by the Commission, the respondent has failed to prove that he sustained any damages in consequence of the petitioner's failure to publish a reasonable proportional rate from the international boundary to destination.

B.

The Decision of the Circuit Court of Appeals was in Error.

The Circuit Court of Appeals held that the proportional rate from the boundary was applicable only as a part of the through rate and as such the Commission found it unjust and unreasonable; that it must be assumed that the Commission considered the rate in question as a part of the through rate; that the petitioner committed a tort because it collected the unjust and unreasonable proportional rate; and that plaintiff's damages are measured by the difference between the unjust and unreasonable proportional rate and the maximum rate found reasonable by the Commission (Rec.45....).

The arguments submitted by the petitioner as to why the measure of damages used by the Commission was improper, which were substantially those submitted herein, were not discussed or answered in any way except in the ultimate conclusion that such measure of damages was correct. It is true that the Circuit Court of Appeals cited as authority for this conclusion the decision of the Supreme Court in *Louisville & Nashville R. R. v. Sloss-Sheffield Co., supra.* But we have already pointed out wherein that decision is not applicable here. In that case the Commission found the through rate *unreasonable* and the Supreme Court held such a finding sufficient to support an award of damages. Here the Commission made no such finding but found only that one factor of the through rate was unreasonable and we contend that such a finding is not sufficient to support an award of damages. It is not a sufficient answer to our contention to point to the decision holding that a finding that the through rate was unreasonable is sufficient. That, we believe, is equivalent to answering a contention that the facts do not bring a case within a rule by pointing to the rule or meeting a contention that the evidence did not justify a verdict by pointing to the verdict.

We do not understand what connection ~~there is~~ between the ultimate conclusion of the Circuit Court of Appeals and its statement that it must be assumed that the Commission considered the proportional rate in question as a part of the through rate. Of course the Commission is aware that every proportional rate is by its very nature a part of a through rate and cannot be used except as a part of a through rate. We have contended that at least so far as damages are concerned a proportional rate should not be considered apart from the through rate and that a shipper is interested only in the reasonableness of the through rate. The Circuit Court of Appeals seems to admit the force of this argument and to recognize that the proportional rate must be considered as a part of the through rate.

But if the Circuit Court of Appeals meant to imply that the Commission in considering the proportional rate as a part of the through rate and in determining that it was unreasonable, thereby, in effect, found that the through rate was unreasonable to the same extent and in the same amount as the proportional rate, we submit that there was no justification for such a conclusion. As the Supreme Court said in *Keogh v. C. & N. W. Ry.*, 260 U. S. 156, 165, damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. If the Commission had intended to find that the through rate was unreasonable to the same extent as the proportional rate it would have said so in plain terms and not left it to conjecture. That it was not the intent of the Commission to make such a finding is made clear from the dissenting of Commissioner Brainerd, concurred in by Commissioner Woodlock, (Rec. 34) in which attention is called to the fact that only the proportional rate is found unreasonable, and that fact is made the basis of the dissent. It cannot be doubted that the Commission, with a clear realization of what it was doing, based its award of damages solely on the finding that the proportional rate was unreasonable and without giving any consideration whatever to the reasonableness of the through rate, under the belief that respondent's damages might properly be measured by the extent to which such proportional rate was unreasonable and regardless of the fact that the through rate may have been reasonable.

There was no finding by the Commission that the through rate was unjust and unreasonable and consequently there could be no evidence from which the District Court could find that rate was unjust and unreasonable. In the absence of evidence the law will presume that men acted lawfully rather than unlawfully. Therefore the law will presume that the through rate collected in this case was just and reasonable rather than unjust and unreasonable. That being true the only question is whether or not under these facts the respondent is entitled to damages by way of reparation. We submit that he is not.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors committed by the Circuit Court of Appeals may be corrected, and that to such end a writ of certiorari should be granted by this Court and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

R. J. HAGMAN,
J. P. PLUNKETT,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1934.

No. 499.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

P. B. SULLIVAN, doing business as ALBERTA COAL SALES COMPANY,
Respondent.

BRIEF ON BEHALF OF PETITIONER.

R. J. HAGMAN,
J. P. PLUNKETT,
Counsel for Petitioner.

St. Paul, Minn., January 2, 1935.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

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GREAT NORTHERN RAILWAY COMPANY,

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vs.

P. B. SULLIVAN, doing business as ALBERTA COAL SALES COMPANY,

Respondent.

BRIEF ON BEHALF OF PETITIONER.

The petition filed by the Great Northern Railway Company seeking a review on a writ of certiorari of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in No. 9871, Great Northern Railway Company, Appellant, v. P. B. Sullivan, doing business as Alberta Coal Sales Company, Appellee, was granted by this Court on December 3, 1934.

I.

The Opinions of the Courts Below.

The opinion of the District Court of the United States for the District of Minnesota, Third Division, dated July 27, 1933, has not been officially reported but is found at pages 11 to 14 of the Record.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, dated September 4, 1934, is reported in *Great Northern Ry. Co. v. Sullivan*, 72 Fed. (2d) 587, and is found at pages 42 to 45 of the Record.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on September 5, 1934 (R. 46), less than three months prior to the date of application for this writ of certiorari (U. S. Code, Title 28, Sec. 350).

The jurisdiction of the Supreme Court is invoked under paragraph (a) of Section 240 of the Judicial Code, as amended and re-enacted by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

III.

Statement of the Case.

The respondent, engaged in wholesaling coal, brought an action in the District Court of the United States for the District of Minnesota against the petitioner, Great Northern Railway Company, to recover the sum of $3,990.20 awarded by the Interstate Commerce Commission as reparation on numerous carload shipments of coal from points of origin in the Province of Alberta, Canada, to destinations in the State of North Dakota. These shipments moved under through bills of lading executed at the Alberta points of origin covering the movement to the destinations in North Dakota. The freight charges collected by the petitioner at the several destinations were computed by the use of through rates made up of two factors, one a so-called proportional rate from the point of origin in Alberta to the international boundary applicable only on coal destined to points south of the boundary, the other a proportional rate from the international boundary to the destination in North Dakota applicable only on coal originating north of the boundary. The petitioner paid over to its connecting carriers operating north of the boundary that portion of the freight charges applicable to that portion of the haul (R. 20-22).

In the proceeding before the Interstate Commerce Commission the respondent alleged only that the proportional rates applicable from the international boundary to the destinations in North Dakota were unjust and unreasonable. No complaint was made respecting the proportional rates from the origins in Alberta to the international boundary nor the through rates from the origins in Alberta to the destinations in North Dakota that resulted from the combination of these proportional rates (Rec. 24-28). The Commission in its report (142 I. C. C. 543) found, with Commissioners Brainerd, Woodlock, Porter and Taylor dissenting, that the proportional rates from the international boundary to the destinations in North Dakota were unreasonable to the extent that they exceeded a scale of rates set forth in the decision, and awarded reparation in the sum of $3,990.20, representing the difference between such proportional rates charged and those set forth in said scale. The Commission made no finding with respect to the reasonableness of the proportional rates from the origins in Alberta to the international boundary nor of the resulting through rates from such origins to the North Dakota destinations (R. 30-39).

The petitioner having refused to pay the reparation awarded by the Commission, the respondent, on April 22, 1931, brought an action on the award in the District Court of the United States for the District of Minnesota, Third Division (R. 1). At the trial a jury was waived (R. 10) and the case was submitted on a stipulation of facts (R. 19). At the conclusion of the case the petitioner moved the trial court for judgment in favor of the petitioner on the ground that there was no substantial evidence of record to support any other conclusion than that the petitioner was entitled to judgment (R. 25). The trial court denied this motion (R. 11) and on July 27, 1933, entered a judgment in favor of the respondent for the amount of the reparation awarded by the Commission with interest (R. 11-16).

The petitioner perfected an appeal to the Circuit Court of Appeals for the Eighth Circuit (R. 16-41) in which the following errors were assigned (R. 18):

1. The United States District Court for the District of Minnesota, Third Division, erred in failing to find as a matter of law that the findings of fact made by the Interstate Commerce Commission were not sufficient in law to support its order awarding damages to the plaintiff.

2. That said court erred in denying defendant's motion for finding and judgment in its favor upon the ground that there was no substantial evidence of record to support any other conclusion than that defendant was entitled to judgment.

On September 4, 1934, the Circuit Court of Appeals rendered a decision in which it held that it was the petitioner's duty to publish and charge a just and reasonable rate for the transportation of the respondent's freight from the international boundary to points in the United States; that the Interstate Commerce Act empowered the Commission to regulate the rates over that part of the transportation which took place within the United States; that in collecting the unjust and unreasonable proportional rates from the international boundary to points in the United States the petitioner committed a tort making it liable for any damages resulting therefrom; that the court would assume that the Commission considered the proportional rates from the international boundary to the points in the United States as part of the through rates from the origins in Canada to the destinations in the United States; and that the respondent's damages were properly measured by the difference between the proportional rates charged for the transportation from the international boundary to the points in the United States and rates for the same transportation found reasonable by the Commission (R. 42-45).

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in finding and holding that the respondent had suffered damages measured by the difference between the proportional rates from the international boundary to the North Dakota destinations applied by the petitioner and those found reasonable by the Commission.

2. The Circuit Court of Appeals erred in finding and holding that in finding unreasonable the proportional rates from the international boundary to the North Dakota destinations the Commission, in effect, found unreasonable the through rates from the Alberta origins to the North Dakota destinations.

3. The Circuit Court of Appeals erred in entering judgment against the petitioner and in favor of the respondent.

ARGUMENT.

Points Relied Upon.

A. The respondent has failed to prove that he sustained any damages in consequence of the petitioner's tort in collecting the unreasonable proportional rates from the international boundary to the destinations in the United States.

1. In order to recover for the violation of the Act by a common carrier a shipper must show that he has sustained damages in consequence of such violation.

2. The respondent has made no specific proof of pecuniary damage.

3. A finding by the Commission holding that one factor of a through rate was unreasonable and specifying the extent of such unreasonableness is not sufficient evidence to support a judgment for damages sustained on a shipment that was transported on the through rate.

B. In finding that the proportional rates from the international boundary to the destinations in the United States were unreasonable the Commission did not, by inference, find that the through rates were unreasonable.

A

The respondent has failed to prove that he sustained any damages in consequence of the petitioner's tort in collecting the unreasonable proportional rates from the international boundary to the destinations in the United States.

1. *In order to recover for the violation of the Act by a common carrier a shipper must show that he has sustained damages in consequence of such violation.*

Section 8 of the Interstate Commerce Act provides:

> "In case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby *for the full amount of damages sustained in consequence* of any such violation of the provisions of this Act * * *." (Italics added.)

Therefore in order to recover damages from a carrier under the Act one must prove not only the violation of some provision of the Act by the carrier but also that he has suffered pecuniary damage in consequence of such violation. *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447; *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184; *Davis v. Portland Seed Co.*, 264 U. S. 403.

2. *The respondent has made no specific proof of pecuniary damage.*

The respondent offered no evidence whatever on the question of damages except the finding of the Commission that the proportional rates south of the international boundary were unreasonable to the extent that they exceeded the rates prescribed for the future. He contends that no other evidnce was necessary.

3. *A finding by the Commission holding that one factor of a through rate was unreasonable and specifying the extent of such unreasonableness is not sufficient evidence to support a judgment for damages sustained on a shipment that was transported on the through rate.*

As previously stated the shipments involved in this case moved from points in Canada to points in the United States on through bills of lading executed at the origins in Canada covering the entire movement from such origins to destinations in the United States. Freight charges collected at the destinations were computed by the use of through rates made up of two factors, one a proportional rate from the Canadian origin to the international boundary, the other a proportional rate from the boundary to the destination in the United States (R. 21). The Commission found that the proportional rates from the international boundary to the destinations in the United States were unreasonable to the extent that they exceeded a scale of rates set forth in its decision. It made no finding with respect to the proportional rates from the Canadian origins to the international boundary nor with respect to the through rates from such Canadian origins to the destinations in the United States (R. 30-39).

As the Supreme Court said in *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156, 165, damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. It does not follow because one factor of a through rate was unreasonable that the through rate as a whole was unreasonable. In a footnote on page 283 of *U. S. v. Abilene & Southern Ry. Co.*, 265 U. S. 274, the Supreme Court said:

> "The case is wholly unlike those in which it is held that where a shipper attacks a through rate all participating carriers must be made respondents, even though the through rate is made up of separately established elements. The complainant may wish to direct this attack only against one of these. But it is only the through rate which is in issue. *It may be reasonable although one of its elements is not.*" (Italics added.)

Again in *L. & N. R. R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217, 234, this Court said:

> "The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole. It may be unreasonable although each of the factors of which it is constructed was reasonable. *It may be reasonable although some of the factors or of the divisions of the participants, were unreasonable.*" (Italics added.)

It is true that in that case the rate in question was a joint through rate published in a single tariff by the joint action of all the participating carriers, whereas here the separate factors were published in separate tariffs by the individual action of the participating carriers. But in the *Sloss-Sheffield case* the joint rate had been constructed out of existing proportional rates previously published in separate tariffs. The truth of the principle enumerated in that case is not affected by the mere mechanics of publication in which the shipper has no interest. Regardless of the manner of publication it is true that a through rate "may be reasonable although some of the factors or of the divisions of the participants, were unreasonable".

The Interstate Commerce Commission expressed the same thought in *Cairo Board of Trade v. C. C. C. & St. L. Ry.*, 46 I. C. C. 343, when it said on page 351:

> "An excessive reshipping (proportional) rate might produce a reasonable through charge in connection with an unduly low inbound rate and vice versa."

Not only is it true that no inference as to the reasonableness of the through rate can be drawn from the fact that one factor was unreasonable but, as pointed out in the dissenting opinion of two commissioners when this case was before the Interstate Commerce Commission, the record affirmatively shows that the through rates were reasonable (R. 37). Take for example a shipment that moved from Drumheller, Alberta, to Sarles, North Dakota. The distance from Drumheller to the international boundary is 627 miles for which a rate of $3.30 per ton was charged (R. 25). The scale prescribed by the Commission only ran as high as 500 miles for which a rate of $3.95 was prescribed (R. 36). The distance from the international boundary to Sarles is 293 miles for which a rate of $3.50 was charged (R. 25). The rate prescribed by the Commission for that distance was $2.90 (R. 36). Thus it will be seen that if both factors of the through rate had been on the Commission's scale the through rate would have been 5 cents higher than that charged to the respondent. This example is representative of all the shipments and shows affirmatively that the through rates were reasonable. The fact is that the Canadian lines published such low rates to the boundary that, when combined with the rates south of the boundary, they produced reasonable through rates in spite of the fact that the rates south of the boundary standing alone were unreasonable.

But it will be contended by respondent that it is immaterial whether or not the through rates were unreasonable; that if the record shows that the factors south of the international boundary were unreasonable that is sufficient to support an award of damages even if the through rates were in fact reasonable. That was the respondent's position in the Court below and it must necessarily be his position here for it seems clear that the record does not show that the through rates were unreasonable. In the court below as well as in its brief in answer to the petition for certiorari in this Court the respondent relied upon three cases in support of this position, viz.:

L. & N. R. R. Co. v. Sloss-Sheffield Co., 269 U. S. 217.
N. Y. N. H. & H. R. Co. v. Ballou & Wright, 242 Fed. 862.
Alberta Coal Sales Co. v. Can. Natl. Rys., 142 I. C. C. 543.

The first, which has been referred to before herein, dealt with reparation claimed on shipments of pig iron from points in Alabama to points on and north of the Ohio River. The Commission had found that the joint through rates from the points of origin to the final destinations were unjust and unreasonable to the extent that they exceeded rates prescribed for the future and awarded reparation for the excess. The carriers contended among other things that because of special facts shown in the record it was not the Sloss-Sheffield Company but the purchasers of iron from it who paid and bore the charges and who were entitled to reparation. In discussing this contention the court said:

> "The carrier concedes, as it must under *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, that a recovery for excessive freight charges can be had under Section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted."

But in that case, as well as in the *Darnell-Taenzer case* cited therein, the Commission found the through rate unreasonable, the very thing which it failed to do here. Consequently the issue presented here was not before the court in those cases, and they cannot be considered as authority for the respondent's position in this case.

In the *Ballou & Wright case*, likewise, the Commission had found the through rate unreasonable and the only question was whether the shipper could recover in view of the evidence that it had passed the freight charges on to buyers as a part of the cost of the goods sold.

The *Alberta Coal Sales case* was the instant case when before the Commission and, of course, the decision of the Commission is not authority in this proceeding where its correctness is being challenged.

Thus we see that none of the cases cited by the respondent is authority for respondent's contention. The issue in this case was not presented or decided in those cases. Nor is there any analogy between the issue here involved and the issues there decided that would justify applying the rule there laid down to this case.

It is self-evident, of course, that if the total freight charges exacted from a shipper for the transportation of goods from a point of origin to destination were unreasonable the shipper would sustain damages measured by the amount of the excess exacted. His injury would be the direct result of and would be in direct proportion to the excess exacted. If the excess were great his injury would be great; if the excess were slight his injury would be slight.

But it does not follow from this that if the total freight charges exacted for the transportation of goods from a point of origin to destination were *not* unreasonable the shipper would nevertheless sustain damages if one of the factors used to compute the through rate was unreasonable nor that such damages should be measured by the amount of the excess of such factor over a reasonable factor. The factors that make up a through rate of this kind merely represent the division of such through rate among the participating carriers. *Morrell & Co. v. N. Y. C. R. R. Co.*, 104 I. C. C. 104, 128. But the division of a rate among the participating carriers is a matter that in no way concerns the shipper. For one reason or another one carrier may take less and another may take more than what would seem to be a reasonable proportion of the through rate. But a shipper is not injured because one carrier may receive more than a reasonable proportion of the through rate. His only interest is that the rate be reasonable as a whole. *Louisville & Nashville R. R. Co. v. Sloss-Sheffield Co., supra.*

The Commission has recognized this principle and applied it consistently to cases where the entire transportation is within the United States. In *Stevens Grocer Co. v. St. L. I. M. & S. Ry. Co.*, 42 I. C. C. 396, 398, the Commission said:

> "When the through rate or charge is made up of separately established rates or charges, applicable to the through business, the through rate or charge must be attacked as violative of the act, although the violation may be believed to be occasioned by a particular factor or factors thereof; in such case the complainant should be prepared at the hearing to prove the unlawfulness of the through rate itself and that this is due to a particular factor or factors."

In *Cairo Board of Trade v. C. C. C. & St. L. Ry. Co.*, 46 I. C. C. 343, the Commission modified its decision in the Stevens Grocer Co. case to the extent of holding that the Commission might find that a proportional rate was unreasonable in a case where the through rate was not attacked but it laid down the rule that in determining whether a shipper had been *damaged* the Commission must consider the total through charges, saying on page 350:

> "The rule is stated in the *Stevens Grocer Co. Case* more broadly than it should be. In determining whether or not a complainant has been damaged by the exaction of unreasonable or unduly preferential reshipping (proportional) rates the total through charges paid from point of origin must be considered."

Again in the same case it is said, page 351:

> "An excessive reshipping (proportional) rate might produce a reasonable through charge in connection with an unduly low inbound rate and vice versa."

In *Atlantic Terra Cotta Co. v. A. & W. P. Ry. Co.*, 151 I. C. C. 45, the Commission said on page 52:

> "In *Cairo Board of Trade v. C. C. C. & St. L. Ry. Co.*, 46 I. C. C. 343, 350, we announced a principle, which has since been consistently followed, that where a through rate is made up of separately established components we may pass upon the lawfulness of any one of the components independent of the others for the future, but where the matter of reparation on past shipments is concerned the total through charges must be considered."

The same principle was very neatly expressed by Commissioner Tate in a dissenting opinion in *The Newsprint Paper Investigation*, 197 I. C. C. 738, 791, when he said:

> "It seems clear to me that it was the failure to publish a just and reasonable rate from the border that constituted the tort. Had this publication been made, even if the joint international rate had been unreasonable, it would have constituted an illustration of *damnum absque injuria*, just as, if the joint international rate had not been unreasonable, the tort itself, to-wit, the failure to publish a just and reasonable rate from the border, would have been an illustration of *injuria sine damno*."

While the precise question here under consideration has never been decided by the Supreme Court it is our opinion that this court recognized the principle for which we are contending here and applied it in *News Syndicate Co. v. N. Y. C. R. R. Co.*, 275 U. S. 179. In that case numerous carload shipments of newsprint paper had been made from Thorold, Ontario, to New York City at a joint through rate from the point of origin to destination which the Commission found was unreasonable. The carriers participating in that part of the transportation within the United States did not publish a rate on this commodity from the international boundary to New York City.

The Commission awarded reparation measured by the difference between the charges exacted for the through transportation and those that would have accrued at the rates found reasonable by the Commission. In a suit brought in the District Court to enforce that award the District Court sustained a demurrer to the complaint on the ground that it failed to state a cause of action, holding that the Commission's order was void for want of jurisdiction because it dealt solely with charges for transportation from a point in Canada to a point in the United States. Upon appeal to the Circuit Court of Appeals that court certified certain questions to the Supreme Court, among them being the following:

> "1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?"

The answer was "Yes, for the ascertainment of damages". In discussing this question the court said:

> "As to question 1.—The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Secs. 1 (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Secs. 1 (5), Sec. 4 (1) and 7. They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained *in consequence of such failure. Had the through rate been just and reasonable, no damages*

> *would have resulted to plaintiff in error.* Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. *Louisville & Nashville R. R. v. Sloss-Sheffield Co.*, 269 U. S. 217, 231. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this Act for a violation thereof.' Sec. 16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted." (Italics added.)

The analogy between that case and the case at bar is very close. Both involved shipments from points in Canada to points in the United States. In both cases it was the duty of the American carriers to establish just and reasonable rates from the international boundary to the American destination. In both cases the American carriers failed in that duty. In the *News Syndicate case* no rate at all was published; in the case at bar an unreasonable rate. In both cases Section 8 of the Interstate Commerce Act made the American carriers "liable for damages sustained in consequence of such failure." How should those damages be measured? In the *News Syndicate case* the Supreme Court said: "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error." The measure of damages, therefore, was the extent to which the through rate was unreasonable. Should the analogy between these cases stop here? Is there any reason why the measure of damages which the Supreme Court laid down in the *News Syndicate case* should not apply to the case at bar? We can think of none. The only difference between the facts of the two cases is that in the *News Syndicate case* no rate at all was published from the boundary whereas in this case an unreasonable rate was published. Is this difference sufficient to justify a different measure of damages? The decision in the *News Syndicate case* indicates that the Supreme Court measured the damages by the through rate, not because no rate had been published from the boundary, but because that was the proper measure of damages. "Had the through rate been just and reasonable, no damage would have resulted to plaintiff in error". We submit that the same principle should be applied to the case at bar. If the through rate in this case was just and reasonable no damages resulted to the respondent.

We submit, therefore, that a finding by the Commission holding that one factor of a through rate was unreasonable and specifying the extent of such unreasonableness is not sufficient evidence to support a judgment for damages sustained on a shipment that was transported on the through rate and since that was the only evidence introduced on the question of damages we submit that the respondent failed to prove damages and judgment should have been entered for the petitioner.

B

In finding that the proportional rates from the international boundary to the destinations in the United States were unreasonable the Commission did not, by inference, find that the through rates were unreasonable.

In discussing the principle for which we are contending here and which we urged before the Circuit Court of Appeals, that Court said:

> "In collecting the exorbitant freight charges on the traffic in question, defendant committed a tort, making it liable for any damage resulting therefrom, but defendant ingeniously argues that inasmuch as the Commission did not find that the entire through-rate was excessive or exorbitant, it cannot be said that plaintiff has been injured. The tariff as published, established the rate in question as a proportional rate. It was applicable only as a part of the through-rate, and as such it was found to be unjust, unreasonable, and excessive. In other words, the Commission considered this rate not as an independent rate from the international boundary to the point of destination, but as a part of the international through-rate from point of origin to point of destination. If, as argued by defendant, the rate from the point of origin to the international boundary may have been very low, still we must assume that the Commission considered the rate in question as a part of the through-rate." (R. 44-45.)

We are not clear what thought the Court meant to convey by that paragraph. Of course every proportional rate is by its very nature a part of a through rate and cannot be used except as such. Standing alone it has no more significance than has a word indicating a fractional part such as "half" or "fourth," without knowledge of the whole of which it indicates a part. We have contended throughout this proceeding that a proportional rate should not be considered except as part of a through rate and that the reasonableness of the through rate as a whole cannot be determined by considering only some fractional part of which it is composed. In our opinion it simply does not follow that the whole rate must be unreasonable because a portion of it is found to be so. We believe that the decisions of this Court to which we have called attention support our view.

But if the Circuit Court of Appeals meant to imply that the Commission in considering the proportional rate as a part of the through rate and in determining that it was unreasonable, thereby, in effect, found that the through rate was unreasonable to the same extent and in the same amount as the proportional rate, we submit that there was no justification for such a conclusion. As the Supreme Court said in *Keogh v. C. & N. W. Ry.*, 260 U. S. 156, 165, damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. If the Commission had intended to find that the through rate was unreasonable to the same extent as the proportional rate it would have said so in plain terms and not left it to conjecture. That it was not the intent of the Commission to make such a finding is made clear from the dissenting of Commissioner Brainerd, concurred in by Commissioner Woodlock (R. 37), in which attention is called to the fact that only the proportional rate is found unreasonable, and the failure to find the through rate unreasonable is made the basis of the dissent. It cannot be doubted that the Commission, with a clear realization of what it was doing, based its award of damages solely on the finding that the proportional rate was unreasonable and without giving any consideration whatever to the reasonableness of the through rate, under the belief that respondent's damages might properly be measured by the extent to which such proportional rate was unreasonable and regardless of the fact that the through rate may have been reasonable.

There was no finding by the Commission that the through rate was unjust and unreasonable and consequently there was no evidence from which the District Court could find that rate was unjust and unreasonable. In the absence of evidence the law will presume that men acted lawfully rather than unlawfully. Therefore the law will presume that the through rate collected in this case was just and reasonable rather than unjust and unreasonable. That being true the only question is whether or not under these facts the respondent is entitled to damages by way of reparation. We submit that he is not.

Respectfully submitted.

R. J. HAGMAN,
J. P. PLUNKETT,
Counsel for Petitioner.

St. Paul, Minn., January 2, 1935.

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CHARLES ELMORE CRO

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 499.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

P. B. SULLIVAN, DOING BUSINESS AS ALBERTA COAL SALES COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

Petitioner's statement (petition for writ of certiorari, pp. 1-5) is substantially a full and correct one.

RESPONDENT'S POINTS AND AUTHORITIES.

The express provisions of the Interstate Commerce Act required petitioner to publish and charge a just and reasonable rate for the transportation of respondent's freight from the international boundary to the destinations thereof in the United States.

Interstate Commerce Act, Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, U. S. Code Annotated, title 49, section 1 (1), (2), (5); section 6, (1), (7); section 8, section 13, (1).

News Syndicate Co. vs. N. Y. C. R. Co., 275 U. S. 179, 72 L. Ed. 225.

Lewis-Simas-Jones Co. vs. Southern Pacific Co., 283 U. S. 654, 75 L. Ed. 1333.

Conformable to the provisions of the Act, petitioner published and collected a charge which the Interstate Commerce Commission has found was, as applied to respondent's shipments, unjust and unreasonable.

Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al., 142 I. C. C. 543.

The charging by petitioner of an unjust and unreasonable rate for the transportation of respondent's freight was a violation of the Interstate Commerce Act which damaged respondent, within the meaning of the provisions of the Act, and entitled respondent to a judgment against petitioner for the amount of that damage.

Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al., 142 I. C. C. 543.

Meeker vs. Lehigh Valley R. Co., 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328.

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

Lewis-Simas-Jones Co. vs. Southern P. Co., 283 U. S. 654, 75 L. Ed. 1333.

News Syndicate Co. vs. N. Y. C. R. Co., 275 U. S. 179, 72 L. Ed. 225.

Adams v. Mills, 286 U. S. 397, 76 L. Ed. 1184.

Interstate Commerce Act, Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, U. S. Code Annotated, title 49, section 1, (5).

The amount of respondent's damage is measured by the difference between the unjust and unreasonable charge exacted and the charge found just and reasonable by the Interstate Commerce Commission, with interest upon the total amount of such difference.

> *Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co.*, 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.
>
> *New York, N. H. & H. R. Co. vs. Ballow & Wright* (C. C. A., 9th Circuit), 242 Fed. 862, 155 C. C. A. 450.
>
> *Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al.*, 142 I. C. C. 543.

ARGUMENT.

I.

THE EXPRESS PROVISIONS OF THE INTERSTATE COMMERCE ACT REQUIRED PETITIONER TO PUBLISH AND CHARGE A JUST AND REASONABLE RATE FOR THE TRANSPORTATION OF RESPONDENT'S FREIGHT FROM THE INTERNATIONAL BOUNDARY TO THE UNITED STATES DESTINATIONS THEREOF.

The Interstate Commerce Act, section 1, subdivisions (1), (2) and (5); section 6, subdivision (1); section 8 and section 13, subdivision (1), provide:

> "Section 1. (1) That the provisions of this Act shall apply to common carriers engaged in
>
> (a) The transportation of * * * property wholly by railroad * * * from or to any place in the United States to or from a foreign country, *but only in so far as such transportation * * * takes place within the United States.*
>
> (2) The provisions of this Act shall also apply to such transportation of * * * property * * * *but only*

*in so far as such transportation * * * takes place within the United States.*

(5) All charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 6. (1) That every common carrier *subject to the provisions of this Act* shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates * * * and charges for transportation between different points on its own route. * * *

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act. * * *

Section 13. (1) That any person, firm, corporation * * * complaining of anything done or omitted to be done by any common carrier *subject to the provisions of this Act*, in contravention of the provisions thereof, may apply to said Commission. * * *"

Respondent's position is fully sustained by:

News Syndicate Co. vs. N. Y. C. R. Co., 275 U. S. 179, 72 L. Ed. 225.

Lewis-Simas-Jones Co. vs. Southern Pacific Co., 283 U. S. 654, 75 L. Ed. 1333.

In *News Syndicate Co., supra*, the Court said:

"The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. * * * It was the duty of defendants in error to establish just and reasonable rates for that service. * * * *The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act.* * * *"

In *Lewis-Simas-Jones Co., supra*, the Court said:

"While the Act does not govern the joint through international rate, the demand for reparation is grounded on the claim that the maintenance of that rate participated in by the American carrier and *its violation of*

> *the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination*, operated to compel payment of the charges based on the excessive joint rate."

It was, therefore, petitioner's duty to publish and apply a just and reasonable rate for the transportation of respondent's freight from the international boundary to the destinations of the freight in the United States.

II.

PETITIONER HAS PUBLISHED AND COLLECTED A CHARGE WHICH THE INTERSTATE COMMERCE COMMISSION HAS FOUND WAS WHEN EXACTED UNJUST AND UNREASONABLE.

In *Alberta Coal Sales Company, et al., vs. Canadian National Railways, et al., supra*, the Interstate Commerce Commission found (R., pp. 32, 33):

> "Upon all the facts of record we find that, as applied to the Canadian coal to which this proceeding relates and for both single-line and joint-line hauls, the rates assailed were, are, and for the future will be unjust and unreasonable to the extent that they have exceeded or may exceed the rates per ton of 2,000 pounds set forth in the sub-joined table for the respective distances shown and which we find to be the maximum reasonable rates for application to the transportation of the traffic in question."

Petitioner, as required by the Act, published a charge, applicable to the transportation of respondent's shipments, from the international boundary to the destinations thereof in the United States. This charge the Interstate Commerce Commission found to be unjust and unreasonable and, therefore, in violation of the provisions of Section 1 of the Act.

No attack is made by petitioner upon the propriety of this finding by the Commission. It does not question the unreasonableness of the rate from the boundary to United States destinations. Its attack is solely that the Commission did not find unreasonable the entire through charge.

III.

PETITIONER'S UNJUST AND UNREASONABLE CHARGE FOR TRANSPORTING RESPONDENT'S SHIPMENTS WAS A VIOLATION OF THE ACT WHICH DAMAGED RESPONDENT.

In *Alberta Coal Sales Company, et al., vs. Canadian National Railways, et al., supra*, the Interstate Commerce Commission found (R., p. 34):

> "We further find that complainants and the Monarch Elevator Company, intervener, made shipments under the rates herein found unreasonable and paid or bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued or would accrue at the rates herein found reasonable, and that they are respectively entitled to reparation in those amounts, with interest."

In section 1, subdivision (5) of the Interstate Commerce Act, it is required that

> "(5) All charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

In the *News Syndicate Co. case, supra*, and the *Lewis-*

Simas-Jones Co. case, supra, the Court held that it was the duty of defendants in error to establish just and reasonable rates for the transportation from the international boundary to destinations in the United States.

Throughout the history of common carrier law, long before the enactment of the Interstate Commerce Act, and ever since, it has never been questioned that the payer of an unjust and unreasonable rate is damaged to the extent the charge collected exceeds a just and reasonable rate.

Petitioner surely does not assert the contrary.

Meeker vs. Lehigh Valley R. Co., 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328.

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

Lewis-Simas-Jones Co. vs. Southern P. Co., 283 U. S. 654, 75 L. Ed. 1333.

> "If the defendants exacted from them an unlawful charge, the exaction was a tort, for which the defendants were entitled, as for other torts, to compensation from the wrongdoer."
>
> *Adams vs. Mills*, 286 U. S. 397, 76 L. Ed. 1184.

IV.

THE AMOUNT OF RESPONDENT'S DAMAGE IS MEASURED BY THE DIFFERENCE BETWEEN THE UNREASONABLE CHARGE EXACTED AND THE CHARGE FOUND REASONABLE BY THE COMMISSION.

When a carrier has exacted an unreasonable rate, the payer is damaged in the amount the exaction exceeds the reasonable rate with interest.

> "The carrier concedes, as it must under *Southern P. Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 62 L.

Ed. 451, P. U. R. 1918 B, 598, 38 Sup. Ct. Rep. 186, that a recovery for excessive freight charges can be had under section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted."

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

New York, N. H. & H. R. Co. vs. Ballow & Wright (C. C. A. 9th Circuit), 242 Fed. 862, 155 C. C. A. 450.

In *Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Commission said (R., p. 34):

> "We further find that complainants * * * made shipments under the rates herein found unreasonable and paid and bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued * * * at the rates herein found reasonable, and that they are respectively entitled to reparation in those amounts, with interest."

V.

General Answer to Petitioner's Argument.

The Interstate Commerce Act treats a domestic through rate composed of separate factors quite differently from an international through rate similarly composed. With respect to the international rate, the provisions of the act are specific. The carrier must publish separately a rate for so much of the transportation as takes place within the United States. No such provision is made for the separate factors of a through rate where the transportation is entirely within the United States.

There is, obviously, a practical consideration affecting the international rate which does not affect an exclusively domestic rate. Carriers within the United States are subject to the Interstate Commerce Act and the Interstate Commerce Commission. Carriers in Canada are subject to the provisions of a different transportation act and the jurisdiction of a similar commission.

If the rate is a joint through rate, published as were the rates in *News Syndicate, supra*, and *Lewis-Simas-Jones Company, supra*, one Commission might find the joint through rate a reasonable one; the other might find it unreasonable. The same might be true if the two proportional factors of the rate were submitted to the consideration of the two commissions. The two commissions might agree. They might disagree.

Obviously, the only satisfactory method of procedure is that prescribed by the Interstate Commerce Act, namely, the publication by carriers performing transportation within the United States of a just and reasonable rate for that service. Such a rate can then be considered by the Interstate Commerce Commission and its finding accepted as binding upon everyone, whether in the United States or in Canada. Similarly, the Canadian proportion of the rate can be considered by the Canadian tribunal and its conclusion accepted by all. Unless international rates are so published and considered, confusion and uncertainty will inevitably result.

The entirely different situation in respect of the international and the domestic rate makes irrelevant petitioner's reference to the treatment of domestic joint through rates by the Interstate Commerce Commission or by the courts. There is no requirement in the Act that a proportional rate, or any other rate, constituting one of the factors of a joint through domestic rate shall be separately published for so much of the transportation as it represents. There is such a provision with respect to a through international rate.

The *News Syndicate* and *Lewis-Simas-Jones cases, supra*, hold that the publication of a joint through international rate is a violation of the Act because the Act requires the publication of a just and reasonable rate by United States carriers for so much of the transportation as occurs within the United States, and that the Interstate Commerce Act does not govern the joint through international rate. The publication of a joint through domestic rate is, of course, well within the provisions of the Act and its reasonableness must then, for certain purposes, be considered as a whole rather than as an aggregation of separate factors.

Obviously, there is no sensible reason for requiring the domestic portion of an international rate to be separately published if the only issue to be considered in the case of an international through rate is the reasonableness of the total charge for the entire transportation, both within and without the United States. If such is the case, the publication of the domestic, portion of the rate would be a useless requirement and proceeding; if, even though the domestic factor be unjust and unreasonable and so found by the Interstate Commerce Commission, the damage resulting from a violation of the Act is purely nominal if the total charge for the total transportation service nevertheless was just and reasonable.

Transportation in the United States and in Canada, as is well-known, occur under very different circumstances and conditions. In Canada, for instance, the base for taxation of carriers is much less than that prevailing in the United States. Much of the Canadian transportation system is owned, operated or controlled by the national government of Canada. The presentation of evidence to show a joint through rate to be unreasonable or the Canadian portion of a through rate to be unreasonable is obviously a very different thing for a shipper or receiver of freight in the United States than is a similar showing with respect to a domestic rate. He may wish to confine his redress for an unreasonable rate to such evidence as he can obtain in this country and present it to the Interstate Commerce Commission, refraining from any attack upon the Canadian portion of the rate. And if he so chooses, he should be entitled to the redress provided by the laws of the nation where he resides and does business. The same privilege and right ought to obtain for the Canadian.

Petitioner's case, in substance, is that respondent cannot recover damages in this case unless the through charge made for the transportation of appellee's shipments from the Canadian originating points to the United States destinations was unjust and unreasonable as a total, through charge.

This contention is fully answered by respondent's argument as developed in the earlier sections of this brief.

All of the cases cited by petitioner except *News Syndicate Co., supra*, and *Lewis-Simas-Jones Co., supra*, are for transportation entirely within the boundaries of the United States and under provisions of the Act not limited in their effect specifically by the expression in section 1 of the Act, "*but only in so far as such transportation * * * takes place within the United States.*" Cases dealing with exclusively domestic rates are, therefore, not pertinent to the issue now presented to this court.

By the express terms of the Interstate Commerce Act, respondent could not complain of the through charge, nor of the Canadian portion of the rate.

Section 13, subdivision (1) of the Act provides:

> "(1) That any person, firm, corporation * * * complaining of anything done or omitted to be done *by any common carrier subject to the provisions of this Act*, in contravention of the provisions thereof may apply to said Commission by petition. * * *"

Section 1, subdivisions (1a), (2) of the Act provide:

> "(1) That the provisions of this Act shall apply to common carriers engaged in
>
> (a) The transportation of * * * property wholly by railroad * * * from or to any place in the United States to or from a foreign country, *but only in so far as such transportation * * * takes place within the United States.*"

In the *Lewis-Simas-Jones Co. case, supra*, the United States Supreme Court said:

> "*While the Act does not govern the joint through international* rate, the demand for reparation is grounded on the claim that the maintenance of that rate participated in by the American carrier and its violation of the Act in failing to maintain a just and reasonable rate for the tránsportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate."

The *News Syndicate Co.* and *Lewis-Simas-Jones Co. cases, supra*, clearly hold that it is a "violation of the Act in failing to maintain a just and reasonable rate for the transportation from the boundary to destination."

If this is true, it is equally clearly a violation of the Act, entitling respondent to apply to the Commission for a determination of its right to damages, if petitioner maintains and applies, as it did here, an unjust and unreasonable rate from boundary to United States destinations.

VI.

The conclusion reached by the Court below was right. Its judgment should be affirmed.

Minneapolis, Minnesota, November 10th, 1934.

Respectfully submitted,

Ormie C. Lance,
Stanley B. Houck,
Attorneys for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 499.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,
vs.
P. B. SULLIVAN, DOING BUSINESS AS ALBERTA COAL SALES COMPANY,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 499.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

P. B. SULLIVAN, DOING BUSINESS AS ALBERTA COAL SALES COMPANY,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT OF THE CASE.

Petitioner's statement (Petitioner's Brief, pp. 2-6) is substantially a full and correct one.

All italics in this brief are ours unless otherwise stated.

ARGUMENT.

POINTS RELIED UPON.

The express provisions of the Interstate Commerce Act required petitioner to publish and charge a just and reasonable rate for the transportation of respondent's freight from the international boundary to the destinations thereof in the United States.

Conformable to the provisions of the Act, petitioner published and collected a charge which the Interstate Commerce

Commission has found was, as applied to respondent's shipments, unjust and unreasonable.

The charging by petitioner of an unjust and unreasonable rate for the transportation of respondent's freight was a violation of the Interstate Commerce Act which damaged respondent, within the meaning of the provisions of the Act, and entitled respondent to a judgment against petitioner for the amount of that damage without specific proof of pecuniary loss.

The amount of respondent's damage is measured by the difference between the unjust and unreasonable charge exacted and the charge found just and reasonable by the Interstate Commerce Commission, with interest upon the total amount of such difference. Specific proof of pecuniary loss is unnecessary.

The Commission has always held that it might consider the reasonableness of one or more factors of a through rate or charge for a through movement without considering the through rate or charge as a whole, in a reparation case, if a carrier participating in the through movement or a portion of the through charge is not within its jurisdiction or is not subject to the provisions of the Act to Regulate Commerce.

I.

THE EXPRESS PROVISIONS OF THE INTERSTATE COMMERCE ACT REQUIRED PETITIONER TO PUBLISH AND CHARGE A JUST AND REASONABLE RATE FOR THE TRANSPORTATION OF RESPONDENT'S FREIGHT FROM THE INTERNATIONAL BOUNDARY TO THE UNITED STATES DESTINATIONS THEREOF.

The Interstate Commerce Act, section 1, subdivisions (1), (2) and (5); section 6, subdivision (1) (U. S. Code Annotated, title 49, sections 1, 6), provide:

"Section 1. (1) That the provisions of this Act shall apply to common carriers engaged in

(a) The transportation of * * * property wholly by railroad * * * from or to any place in the United States to or from a foreign country, *but only in so far as such transportation * * * takes place within the United States.*

(2) The provisions of this Act shall also apply to such transportation of * * * property * * * *but only in so far as such transportation * * * takes place within the United States.*

(5) All charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 6. (1) That every common carrier *subject to the provisions of this Act* shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates * * * and charges for transportation between different points on its own route. * * *

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, *as defined in this Act,* unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for *such transportation* of passengers or property, or for any service in connection therewith, between the points

named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Respondent's position is fully sustained by:

News Syndicate Co. vs. N. Y. C. R. Co., 275 U. S. 179, 72 L. Ed. 225.

Lewis-Simas-Jones Co. vs. Southern Pacific Co., 283 U. S. 654, 75 L. Ed. 1333.

In *News Syndicate Co., supra*, the Court said:

> "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. * * * It was the duty of defendants in error to establish just and reasonable rates for that service. * * * *The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act.* * * *"

In *Lewis-Simas-Jones Co., supra*, the Court said:

> "While the Act does not govern the joint through international rate, the demand for reparation is grounded on the claim that the maintenance of that rate participated in by the American carrier and *its violation of the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination*, operated to compel payment of the charges based on the excessive joint rate."

It was, therefore, petitioner's duty to publish and apply a just and reasonable rate for the transportation of respondent's freight from the international boundary to the destinations of the freight in the United States.

II.

PETITIONER HAS PUBLISHED AND COLLECTED A CHARGE WHICH THE INTERSTATE COMMERCE COMMISSION HAS FOUND WAS WHEN EXACTED UNJUST AND UNREASONABLE.

In *Alberta Coal Sales Company, et al., vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Interstate Commerce Commission found (R., 35-37):

> "Upon all the facts of record we find that, as applied to the Canadian coal to which this proceeding relates and for both single-line and joint-line hauls, the rates assailed were, are, and for the future will be unjust and unreasonable to the extent that they have exceeded or may exceed the rates per ton of 2,000 pounds set forth in the sub-joined table for the respective distances shown and which we find to be the maximum reasonable rates for application to the transportation of the traffic in question."

Petitioner, as required by the Act, published a charge, applicable to the transportation of respondent's shipments, from the international boundary to the destinations thereof in the United States. This charge the Interstate Commerce Commission found to be unjust and unreasonable and, therefore, in violation of the provisions of Section 1 of the Act.

No attack is made by petitioner upon the propriety of this finding by the Commission. It does not question the unreasonableness of the rate from the boundary to United

States destinations. Its attack is solely that the Commission did not find unreasonable the entire through charge.

What petitioner has to say in the paragraph beginning near the bottom of page 9 of its brief, is not a proper matter for consideration by this Court. Petitioner has not attacked the sufficiency of the evidence to sustain the finding of the Commission regarding the reasonableness of the rates; and has not included, in the record, any of the evidence presented to the Commission.

III.

Petitioner's Unjust and Unreasonable Charge for Transporting Respondent's Shipments Was a Violation of the Act Which Damaged Respondent.

In *Alberta Coal Sales Company, et al., vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Interstate Commerce Commission found (R. 36):

> "We further find that complainants and the Monarch Elevator Company, intervener, made shipments under the rates herein found unreasonable and paid or bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued or would accrue at the rates herein found reasonable, and that they are respectively entitled to reparation in those amounts, with interest."

In section 1, subdivision (5) of the Interstate Commerce Act, it is required that

> "(5) All charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable, and every unjust and un-

> reasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

In the *News Syndicate Co. case, supra*, and the *Lewis-Simas-Jones Co. case, supra*, the Court held that it was the duty of defendants in error to establish just and reasonable rates for the transportation from the international boundary to destinations in the United States.

Throughout the history of common carrier law, long before the enactment of the Interstate Commerce Act, and ever since, it has never been questioned that the payer of an unjust and unreasonable rate is damaged to the extent the charge collected exceeds a just and reasonable rate.

Specific proof of pecuniary loss has never been considered necessary.

Petitioner surely does not assert the contrary.

Meeker vs. Lehigh Valley R. Co., 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328.

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

Lewis-Simas-Jones Co. vs. Southern P. Co., 283 U. S. 654, 75 L. Ed. 1333.

> "If the defendants exacted from them an unlawful charge, the exaction was a tort, for which the defendants were entitled, as for other torts, to compensation from the wrongdoer."

Adams vs. Mills, 286 U. S. 397, 76 L. Ed. 1184.

Southern P. Co. vs. Darnell-Taenzer Lbr. Co., 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186.

Prior to the enactment of the Transportation Act, 1920 (c. 91, Sections 400, 41 Stat. 474), the words "but only so far as such transportation * * * takes place within the United States," did not appear in Section 1 of the Act to Regulate Commerce. Those words were inserted by that Act.

Unless the specific purpose of the amendment was to cover a case of the exact sort here presented, and to permit an award of reparation in the manner in this case determined by the Commission, it is difficult to understand its purpose.

Both before and since the amendment, the Commission has held it has the fullest power to regulate in every respect the participation by carriers within its jurisdiction in joint rates with foreign carriers and to award reparation against the American carriers to the amount such rate is found to be unreasonable.

Both before and since the amendment, the Commission has held that if the domestic carrier names a local or proportional rate for its portion of the transportation, instead of participating in a joint rate, it is responsible only for its own rate, cannot be held in anyway responsible for the rates, practices, or conduct of foreign carriers, and that the Commission may not concern itself to any extent whatsoever with such foreign rates and carriers.

> *Arizona Lumber & Timber Co. vs. Arizona Eastern Ry. Co.*, 96 I. C. C. 203.

The effect of the amendment is to require the domestic carrier to publish and maintain, when it participates in foreign commerce, a rate for its portion of the transportation—that occurring in the United States.

Why require the separate publication of the domestic component of the rate in such cases, if the reasonableness of the full through charge must nevertheless, in every instance, be considered and determined by the Commission in each case?

Apparently the only reasonable purpose attributable to Congress when it made the amendment is that it intended to completely disassociate the domestic portion of international commerce from the foreign portion thereof and to eliminate all administrative and other difficulties therefrom by giving the Commission a rate basis within its admitted jurisdiction free from all uncertainties; conflicts of jurisdiction with foreign tribunals, and differences of opinion respecting rates between such tribunals, etc., etc.

As the matter now stands, the Interstate Commerce Commission may, exclusively, determine all matters relating to the domestic portion of international rates; and the corresponding Canadian Board may determine all questions relating to the Canadian portion of such rates. There can no longer be conflicts of authority, twilight zones, or differences of opinion where one tribunal holds a rate reasonable and the other holds it unreasonable.

IV.

THE AMOUNT OF RESPONDENT'S DAMAGE IS MEASURED BY THE DIFFERENCE BETWEEN THE UNREASONABLE CHARGE EXACTED AND THE CHARGE FOUND REASONABLE BY THE COMMISSION, WITH INTEREST ON THE TOTAL AMOUNT OF SUCH DIFFERENCE. SPECIFIC PROOF OF PECUNIARY LOSS IS UNNECESSARY.

When a carrier has exacted an unreasonable rate, the payer is damaged in the amount the exaction exceeds the reasonable rate with interest.

"The carrier concedes, as it must under *Southern P. Co. vs. Darnell-Taenzer Lumber Co.,* 245 U. S. 531, 62 L. Ed. 451, P. U. R. 1918 B, 598, 38 Sup. Ct. Rep. 186, that a recovery for excessive freight charges can be had under section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted."

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

New York, N. H. & H. R. Co. vs. Ballow & Wright (C. C. A. 9th Circuit), 242 Fed. 862, 155 C. C. A. 450.

In *Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Commission said (R. 34):

> "We further find that complainants * * * made shipments under the rates herein found unreasonable and paid and bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued * * * at the rates herein found reasonable, and that they are respectively entitled to reparation in those amounts, with interest."

V.

THE COMMISSION HAS ALWAYS HELD THAT IT MIGHT CONSIDER THE REASONABLENESS OF ONE OR MORE FACTORS OF A THROUGH RATE OR CHARGE FOR A THROUGH MOVEMENT WITHOUT CONSIDERING THE THROUGH RATE OR CHARGE AS A WHOLE, IN A REPARATION CASE, IF A CARRIER PARTICIPATING IN THE THROUGH MOVEMENT OR A PORTION OF THE THROUGH CHARGE IS NOT WITHIN ITS JURISDICTION OR IS NOT SUBJECT TO THE PROVISIONS OF THE ACT TO REGULATE COMMERCE.

Petitioner's contention in this regard is: (1) "In order to recover for the violation of the Act by a common carrier a shipper must show that he has sustained damages in consequence of such violation"; and that (2) "A finding by the

Commission holding that one factor of a through rate was unreasonable and specifying the extent of such unreasonableness is not sufficient evidence to support a judgment for damages sustained on a shipment that was transported on the through rate" (Petitioner's Brief, p. 6).

The foregoing statement of principle which petitioner emphasizes throughout its brief is the exception rather than the rule followed by the Commission. The Commission has applied the principle claimed by petitioner only in cases where all carriers involved in a through movement and all rates making up the through charge are within its jurisdiction and subject to the provisions of the Act to Regulate Commerce. The Commission has never applied the rule otherwise.

Commission's Power Over Foreign Rates and Carriers.

With respect to its power over rates applicable to foreign commerce, the Commission has held:

(1) The Commission's authority over rates, rules, regulations and practices of inland carriers applies as well to import as to export traffic (*Boston Wool Trade Assn. vs. Atchison, T. & S. F. Ry. Co.*, 83 I. C. C. 445).

The Commission has no jurisdiction of ocean rates. It must deal with the export and import rate differential question as though the ports were destinations instead of gateways (*Chamber of Commerce of New York vs. New York Central and H. R. R. Co.*, 24 I. C. C. 55).

Its jurisdiction over import traffic attaches at ports of entry (*Philip Carey Mfg. Co. vs. Grand Trunk Western Ry. Co.*, 36 I. C. C. 203).

(2) The Commission has no jurisdiction when the excessive charges complained of accrue solely in the local rate

component of the connecting line in a foreign country and which is operated as a separate road (*Arizona Lumber & Timber Co. vs. A. E. R. R. Co.*, 96 I. C. C. 203, 206); nor to determine whether rates have been lawfully established under the laws of a foreign country (*Greene Cananea Copper Co. vs. Director General*, 80 I. C. C. 1210); nor to prevent foreign carriers from withdrawing their participation in joint rates or to prevent their cancellation upon such withdrawal (*Petroleum and its Products to Canadian Points*, 128 I. C. C. 545).

Canadian railways are not required by law to file tariffs with the Commission showing rates between points in Canada or the conditions which govern such rates (*Grain Rates in United States and Canada*, 142 I. C. C. 755).

The factor of a combination rate applying over a line wholly within Canada and not on file with the Commission is not subject to the Commission's jurisdiction (*Cutler-Hammer Mfg. Co. vs. Director General*, 88 I. C. C. 600, modified 92 I. C. C. 9).

(3) The Commission is without jurisdiction to require the establishment of joint through rates to points in Canada (*United Paper Board Co. vs. Canadian National Rys.*, 74 I. C. C. 733); but it can prohibit (*Sand and Gravel from Canada*, 83 I. C. C. 460) or require, the domestic railroad joining in such rates to cancel its concurrence therein (*United Paper Board Co. vs. Canadian National Rys.*, 74 I. C. C. 733), and to cease from participating in rates which unduly prefer Canadian points (*Maritime Assn., Boston Chamber of Commerce, vs. Ann Arbor R. Co.*, 95 I. C. C. 539).

(4) The Commission having no power to prescribe such joint rates for a service not wholly within the United States,

it is also without power to prescribe their divisions (*New England Divisions*, 126 I. C. C. 579).

(5) The Commission's authority over transportation to or from an adjacent foreign country is over that portion within the confines of the United States (*International Nickel Co. vs. Director General*, 66 I. C. C. 627).

As to rates constructed on combination such factors as apply wholly within the United States are subject to its jurisdiction (*Washington Publishers' Assn. vs. Algoma Central & H. B. Ry. Co.*, 104 I. C. C. 4).

When the Commission considers through rates, made up of combinations of separate factors, applicable to transportation occurring entirely within the United States, it has jurisdiction and complete control of the several carriers concerned and of their respective rates. It can, and does, in such cases, determine the reasonableness of the through rate and of the factors comprising it and directs its order to such carriers and to such rates as violate the Act.

If in such a case the through rate is unreasonable, the Commission may make it reasonable by correcting all or some of the components, and even if reasonable it may correct unreasonable components.

The situation is entirely different with a similarly constructed rate from Canada. The Commission has no jurisdiction of the Canadian carriers nor of the components of the through rate applicable for the transportation over those lines (*Arizona Lumber & Timber Co. vs. Arizona Eastern Ry. Co.*, 96 I. C. C. 203). It can direct no order to them for any purpose either to regulate or control the character of their conduct or to determine the reasonableness of their rates (*Id.*).

Nor can the Commission in the latter case compel representatives of Canadian railroads to appear before it with respect to rates between points in Canada, or the conditions which govern such rates (*Grain Rates in United States and Canada*, 142 I. C. C. 755).

In the case of a domestic through rate, the Commission requires the complaint to be directed to the entire rate, and not a single component thereof and requires all participating carriers to be parties defendant (*State Com. of New Mexico vs. A. T. & S. F. Ry. Co.*, 123 I. C. C. 675). In the case of the Canadian transportation, as has been seen, this cannot be required or done.

When Commission Has Not Considered Through Rate.

Moreover, it has never been the practice of the Commission in the case of export, or import, rates to consider the entire through charge when determining the reasonableness of the portion of the rate applicable in the United States (*Henry Marble Co. vs. B. & O. R. R. Co.*, 146 I. C. C. 414, 169 I. C. C. 311; *Mundet & Son vs. Lehigh Valley R. Co.*, 177 I. C. C. 573, 576); nor, even in the case of an exclusively domestic rate, has the Commission considered the through rate where a part of the through charge is a factor imposed by a carrier not subject to its jurisdiction and whose rates are not on file with it, as, for example, in the case of rail-lake-and-rail transportation (*Lake Cargo Coal Rates, 1925*, 126 I. C. C. 309, 313, 314), nor, in the case of a shipment from Canada where the rate imposed was a Canadian proportional plus a joint rate from a Canadian junction point to the United States (*Cutler-Hammer Mfg. Co. vs. Director General*, 88 I. C. C. 600, 92 I. C. C. 9); nor in the case of Ex-River or Ex-Tide-water Shipments (*Cheney Bros. vs. South Manchester R. Co.*, 147 I. C. C. 421, 428).

"The record shows that the rates charged by the rail carriers from the mines to the lower lake ports are not related to the charges beyond. That is to say, any one of the several separate charges may be changed without affecting the others, and as a matter of fact the charges for the water haul have fluctuated greatly in recent years without affecting the rail charges. Tariffs for the water haul and the other services performed in connection with the transportation of the coal after it has been delivered by the rail lines to the vessels at the lower lake ports until it is again accepted by the rail lines for transportation from the upper lake ports to interior points are not filed with this Commission and it has never exercised jurisdiction over the individuals or companies performing such intermediate services. The haul to the lake ports is unquestionably a part of a through movement and because of this fact the rate may well be different from that for a purely local movement to the same ports, but the proposition to consider the entire distance the traffic moves does not, in the absence of a specific through rate, appeal to us as reasonable, for to apply this principle would, as the total distance increases, finally result in lessening the differential until the rate to the lake ports from all the districts would be the same, and to carry it to its logical conclusion would require that rates to the lower lake ports be established with relation to the final destination of the coal. So far as the respondent carriers are concerned, their connection with the transportation of lake cargo coal ends when the coal is delivered to the vessels at the lower lake ports and they have no interest in the charges beyond the ports save to the extent that the amount of such charges may affect the movement of the traffic. We must therefore deal with the charges for the services which they perform, separately and distinctly from any other charges or any other services."

Lake Cargo Coal Rates, 46 I. C. C. 159, 185.

Moreover, the principle decided in *Southern P. Co. vs. Darnell-Taenzer Lbr. Co.*, 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186, should prevent petitioner from looking beyond the situation created or caused by its own rate and the respondent with whom it deals. It has no right to reduce its own liability by receiving a credit thereon from an alleged inadequate Canadian rate. The process cannot be reversed and petitioner made to respond to respondent if petitioner's rate is reasonable and otherwise according to law and the unlawfulness lies in the foreign factor of the rate.

Commission Considered Through Rate.

When the Commission considered the domestic portion of the rate involved in this case, it necessarily considered the rate as a whole and, to some extent, at least, gave consideration to the reasonableness and measure of that whole rate or charge. The Commission has long held that a proportional rate is a part or remainder of a through rate and, as such, must be considered in relation to the whole rate. (*Southern Kansas Grain and Grain Products Association vs. Chicago, Rock Island and Pacific Ry. Co.*, 146 I. C. C. 700, 702.) (*Boney & Harper Milling Co. vs. A. C. L. R. Co.*, 28 I. C. C. 383.) (*Export Rates on Grain and Grain Products*, 31 I. C. C. 616.)

This is what the lower court adverted to when it said:

> "If, as argued by the defendant, the rate from the point of origin to the international boundary may have been very low, still we must assume that the Commis-

sion considered the rate in question as a part of the through rate. The contention now made may well have been urged before the Commission, and we may presume that it was so urged."

In *Alberta Coal Sales Co., et al. vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Interstate Commerce Commission found (R. 35-37):

> "* * * We find that, as applied to the Canadian coal to which this proceeding relates and *for both single-line and joint-line hauls*, the rates assailed were, are, and for the future will be unjust and unreasonable * * *."

Burden of Proof and Presumptions.

Moreover, in the absence of proof to the contrary, the presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life; and, hence, in the absence of a showing to the contrary, the rates of carriers are presumed to be lawful rates. (*Interstate Commerce Commission vs. Chicago, G. W. Ry. Co.*, 109 U. S. 108, 119, 52 Law Edition 705; *Allan & Lewis vs. Arizona R. & N. R. R. Co.*, 106 Federal 265; *Shloss-Sheffield Steel & Iron Co. vs. Louisville & N. R. Co.*, 51 I. C. C. 635.)

If this be true and the Canadian rate is to be presumed to be a lawful one, the finding that the United States portion of this international rate was excessive necessarily carried with it the finding that the through charge was excessive.

Whether this be true or not, it suggests a practical and appropriate method of handling these situations if the Canadian rate must always be passed on. If it is pertinent and relevant in a case such as that here presented, to consider the through charge when the domestic portion of the rate is shown to be unreasonable, the burden of making the showing should fall upon the carrier which will benefit from the showing, and which, presumably, is better informed regarding the status of the Canadian rate.

If the reasonableness of the Canadian rate is relevant either alone or as a factor of a through rate that showing is clearly a matter of defense to be shown by the carrier suing to avail itself of the defense;—especially where that carrier has violated the provision of the Interstate Commerce Act.

A very unfair situation will arise if any other method of handling the matter is adopted. If the domestic factor of the rate is reasonable and the foreign factor unreasonable, the Interstate Commerce Commission can do nothing and the shipper or consignee of freight in this country can only turn to the Canadian tribunals for relief. If the American factor is excessive and the Canadian factor is inadequate in such manner as to offset that excessiveness, nothing can be done on either side of the border. The only case where any relief can be obtained is the single case where the Canadian factor is explicitly found to be reasonable and the American factor to be unreasonable, but, in all three of the instances suggested, the American tribunals must enter upon a determination of the reasonableness of the Canadian rate under the most difficult and impracticable circumstances.

The Interstate Commerce Commission has held in several cases that where carrier claims that it has complied with the law in publishing a factor applicable to the domestic portion of the transportation, it has the burden of proving this. By analogy, the same duty should exist in a case where it claims that the Canadian factor of the rate is so low as to make the through charges reasonable, notwithstanding an excessive domestic rate.

> "While not admitting that the joint rate assailed was or is unreasonable, defendants say, in substance, that if it were unreasonable, we would nevertheless here be without power to award reparation. The gist of their argument is that the right to an award of reparation by us in such cases as this must be founded, in part, at least, on a failure of the carriers to maintain a rate for the transportation from the origin points in the United States to the international boundary; that the instant record is silent as to whether or not such a rate existed; and that the burden of showing the non existence of such rate was on complainants. It is true that nothing is stated of record as to the existence or non-existence of a rate to the boundary, but if such rate existed, the burden of bringing forward evidence thereof was on defendants. *Lewis, etc., Co. vs. Southern Pac. Co.*, 283 U. S. 654."

Mount Royal Rice Mills vs. Southern Pac. Co., 186 I. C. C. 469.

"As a matter of pleading, a complainant, alleging the exaction of an unreasonable international joint rate, should not be required to anticipate the carriers' defense and negative or seek to avoid it. In such a case, if the carriers have published a rate from the border, an orderly procedure would require them to plead it. Heretofore, a complaint alleging the charging of an unreasonable joint through rate has been deemed sufficient. The very liberal method of pleading and practice, built up for the disposition of matters delegated to this Commission, should not be disregarded except for the most compelling reasons."

Amsden vs. Canadian National Rys., 176 I. C. C. 259.

If an international rate must be considered as a whole, under circumstances such as those existing in this case, respondent should be deemed to have made a *prima facie* case when he shows petitioner violated the provisions of the Interstate Commerce Act.

In passing, it may be said that carriers have, since the amendment to the Act to Regulate Commerce in 1920, made a number of attacks upon the Commission's jurisdiction with respect to the domestic portion of the international rates:

> "Defendants contend that we lack jurisdiction to pass upon the lawfulness of the joint rates assailed because part of the haul is through a foreign country, and because rates were published and maintained for transportation within the United States to and from the international border.
>
> "The United States lines, defendants herein, having elected to participate in joint rates from and to the points considered, we hold we have jurisdiction to determine the lawfulness of the rates applied despite the mere publication concurrently of rates to and from the border which were not applied to the transportation here involved."

Hardy v. Galveston, H. & S. A. Ry. Co., 169 I. C. C. 790.

VI.

GENERAL ANSWER TO MISCELLANEOUS POINTS.

The fact that the shipments involved in this case "moved under through bills of lading executed at the Alberta points of origin covering the movement to the destinations in North Dakota" (Petitioner's Brief, p. 2), is immaterial.

Minnesota vs. Blazius, 290 U. S. 1.

Petitioner states in its brief (p. 3):

> "In the proceeding before the Interstate Commerce Commission the respondent alleged only that the proportional rates applicable from the international boundary to the destinations in North Dakota were unjust and unreasonable. No complaint was made respecting the proportional rates from the origins in Alberta to the international boundary nor the through rates from the origin in Alberta to the destinations in North Dakota that resulted from the combination of these proportional rates. * * * The Commission made no finding with respect to the reasonableness of the proportional rates from the origins in Alberta to the international boundary nor of the resulting through rates from such origins to the North Dakota destinations."

The Interstate Commerce Commission has frequently held that it has no jurisdiction over rates applicable only in a foreign country or over carriers performing transportation only in a foreign country. Had complainant complained of the Canadian proportional rates, it must have made the Canadian carriers defendants. There was, and is, no authority in the Interstate Commerce Act, which explicitly limits its operation to so much of the transportation as takes place in the United States, by virtue of which complainant could serve the Canadian carriers with process or otherwise compel them to respond as defendants before the Interstate Commerce Commission.

> *Arizona Lumber & Timber Co. vs. Arizona Eastern Ry. Co.*, 96 I. C. C. 203.

An international rate may consist of a joint rate or of a through rate made up of separate factors or components. Such through rate may consist of a proportional rate to and from the border; a proportional rate to the border and a local rate beyond; two local rates or any other combination of proportional and/or local rates.

Where the rate is a joint single factor rate, there is no method by which the several interests therein of the several participating carriers can be segregated and separately examined. The ascertainment of their divisions in the joint rate is not sufficient to permit this. All that can be done is to consider the single factor rate as a unit and if it is unreasonable, award reparation against the carrier. Unless this be done, there would be no relief or redress to a domestic shipper in the case of an unreasonable single factor joint international rate.

Probably Congress had in mind the difficulty thus indicated in a joint international rate when, in 1920, it amended section 1 of the Act to Regulate Commerce so as to require domestic carriers to publish a rate for so much of the transportation as takes place in the United States. By so doing, Congress ascertains the charge made for the domestic transportation and permits the Commission to regulate, control it and determine its reasonableness under that Act. It prevents the domestic carrier from profiting from inadequate Canadian rates and from charging more than would otherwise be reasonable and proper.

If petitioner's contention is correct that all international rates made up of separate factors must, if reparation is to be awarded, be considered as a total charge and not solely with respect to the domestic component, the Commission will be required in every case where it finds the domestic portion excessive to determine the reasonableness of the Canadian factor of the rate. This it has always in the past held it has no right to do; that it has no jurisdiction of the carriers or of the rate. It is plain that after it has determined that the rate is excessive or inadequate, it can do nothing to correct the situation. This also means that, in many instances, after the Commission has determined that the domestic rate is excessive, it might find the Canadian rate reasonable and thus have been compelled to perform an unnecessary and useless thing in passing on the reasonableness of the Canadian factor.

It is also likely that there will be frequent instances where the Commission's determination of the reasonableness of the Canadian factor will not be in accord with the determination of the same question by the Canadian tribunal having jurisdiction of Canadian rates.

There are also serious practical and administrative factors. Canadian rates are not made or based upon the same conditions or considerations as are American rates. (*Grain Rates in United States and Canada*, 142 I. C. C. 755, 758, 762.) The tariffs in which those rates are published are not filed with the Interstate Commerce Commission, the accounts of the Canadian carriers are not subject to its jurisdiction, and those accounts are not available as are the accounts of American carriers, the officers of Canadian roads are not subject to subpoena and cannot be required to come to the United States to testify, and, in many other respects, the proof of the unreasonableness of a Canadian rate in the

United States is surrounded with substantial difficulties. In fact such that in all cases not of substantial importance complainant will be discouraged and prevented from proceeding in the face of such obstacles and difficulties.

It would seem logical to assume that Congress, when it amended section 1, in 1920, intended to eliminate all such questions from the consideration of the Interstate Commerce Commission and to leave the question of reasonableness of rates on each side of the border to the tribunal of the country in which the rate is published and applied, and that it intended to make the domestic factor of an international rate independent of and entirely disassociated with any other rate.

Meyer, Commissioner, dissenting in a case involving an international rate, summarized the situation:

> "I can not concur in reversing division 4 for reasons stated in the original report of the division, 151 I. C. C. 207. In my judgment, what it is now proposed to do can not be done without performing one or more of the following unlawful acts:
>
> 1. To legislate for a foreign country by—
> 2. Passing upon the reasonableness of rates in a foreign country when we have no authority to take evidence and to inform ourselves regarding the facts customarily relied upon in establishing reasonable rates.
> 3. To carry into a foreign country our United States standards of reasonableness and to apply them there.
>
> Situations like those presented by the instant case can be fully met, without raising doubtful legal and constitutional questions, by requiring carriers to publish rates to and from international boundaries. The present record affords a sufficient basis for such a finding and for an order carrying such finding into effect. I am author-

ized to say that Commissioner Woodlock concurs in this expression."

> *Cyanamid and Cyanide from Niagara Falls*, 155 I. C. C. 488.

In the same case the comments of Atchison, Commissioner, also dissenting, are interesting and pertinent.

VII.

The conclusion reached by the Court below was right. Its judgment should be affirmed.

Minneapolis, Minnesota, January 26th, 1935.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 499.—October Term, 1934.

Great Northern Railway Company, Petitioner, *vs.* P. B. Sullivan, doing business as Alberta Coal Sales Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 4, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent sued the railway company in the District Court for Minnesota to recover $3,990.20 awarded by the Interstate Commerce Commission as reparation. 142 I. C. C. 543. That court gave him judgment; the Circuit Court of Appeals affirmed. 72 F. (2d) 587. We are called on to decide whether the uncontroverted facts and those found by the commission are sufficient to warrant the conclusion that he sustained damage in consequence of violation of the Act by defendant.

Plaintiff, a wholesale dealer, bought carloads of lignite at mines on the Canadian Pacific in Alberta, and sold the same to retail dealers and others in North Dakota at Great Northern stations in competition with other fuels. The shipments moved on combination rates, being the sum of proportionals made respectively by the Canadian Pacific and the Great Northern,[1] applicable from mines to destinations, and on through bills of lading issued by the former, routing over its railroad to junction with the latter at the international boundary and thence over the railroad last mentioned to places of delivery. The combination rates necessarily reflect agreement, express or implied, between the connecting carriers to establish a through route for continuous carriage from origin on one to destination on the other. Each proportional necessarily was a part of the through rate and was capable of use only as such. *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 139, note 2. They show the basis of division of charges between connecting carriers and serve precisely as do agreed divisions of charges based on joint rates. A proportional differs from a local rate in that it covers only terminal service at place of receipt or at place of delivery but cannot, as does the local rate, cover both. *Lewis, etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 663.[2] There was no applicable joint rate. The Great Northern collected the charges and paid the Canadian Pacific amounts equal to the proportionals established by the latter.

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[1] Canadian Pacific Tariff No. W-5379, I. C. C. No. W-723. Great Northern I. C. C. No. A-5681, G. F. O. No. 435-G.

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[2] As to inland hauls of exports or imports by sea to or from foreign countries see Mobile Chamber of Commerce *v.* M. & O. R. R. Co., 23 I. C. C. 417, 425: "It is easy to be misled by the use of the term 'through bill of lading,' for it implies that the originating carrier has undertaken to carry the traffic from point of origin to an ultimate point of destination—say, from Memphis to Liverpool—and that the originating carrier under the present law is responsible for the fulfillment of this contract of carriage. But the through bill of lading that is given by the rail carriers upon movements of traffic through Mobile . . . to Europe is not at all of this character. It is a receipt on the part of the railroad for the carriage to the port and a receipt by the ship line for the carriage from the port to Europe. This receipt for carriage beyond the port is not given in the name of the rail carrier, but in the name of the steamship company . . . is in reality a separate bill of lading which is attached to the railroad bill of lading. . . . This practice of making a divisible bill of lading showing the ultimate destination of the shipment by water, both of the rates being sometimes stated separately—the rate to the port and the rate from the port, or only one rate being stated, that to the port—is a railroad practice instituted for the convenience of all concerned. The ship line is operated in physical connection with the rail line, but the rail line receives none of the ship line's earnings, makes no division of a through rate with the ship, suffers none of its loss, and takes none of its hazards. The furnishing of a through bill of lading in connection with ship-side delivery at the port of Mobile is not a contract by the rail carrier for shipment beyond at a specified rate, or at any rate, nor does it carry with it any of the elements attaching to the through bill issued by a rail carrier with a rail connection. To call it a through bill of lading is therefore in fact a misnomer."

Through bills of lading issued under the Interstate Commerce Act, § 25 (4) (5), do not constitute "an arrangement for continuous carriage or shipment" within the meaning of the Act. Bills of Lading, 52 I. C. C. 671, 730. Export Bill of Lading, 64 I. C. C. 347.

The Commission deals with rates applicable to inland hauls above referred to and with reparation without consideration of charges or factors attributable to transportation by sea or in foreign countries. Ullman *v.* Adams Express Company, 14 I. C. C. 340, 345. Chamber of Commerce of N. Y. *v.* N. Y. C. & H. R. R. Co., 24 I. C. C. 55, 74. Henry Marble Co. *v.* B. & O. R. R. Co., 146 I. C. C. 414.

Plaintiff and another complained to the commission alleging the proportionals filed by the Great Northern and other American carriers to be unjust and unreasonable in violation of § 1. They did not attack the combination or allege aught against the Canadian Pacific proportional. They prayed merely reasonable maximum American proportionals and reparation to the extent of the excess over such maxima. The commission found the American proportionals to be unjust and unreasonable so far as they exceed specified maxima which it made applicable in lieu of those assailed. It made no finding concerning the reasonableness of the Canadian proportionals or of the combination through rates. There being no claim or finding to the contrary, the charges collected on these shipments must be deemed to have been just and reasonable. Indeed, dissenting commissioners, without opposition on the part of the others, state that they are affirmatively shown to be reasonable.

The Great Northern was by the Act required to file tariffs establishing reasonable proportionals to constitute and to be kept in force as factors in the combination through rates applicable to plaintiff's shipments. Its failure to specify just and reasonable charges was a violation of the Act. And, if injured thereby, plaintiff is entitled to recover the damages sustained in consequence of such failure. 49 U. S. C. § 8. Plaintiff invokes *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U. S. 179, and *Lewis, etc. Co.* v. *Southern Pac. Co., supra.* But neither is like this case. In each, shipments moved from an adjacent country into the United States on through rates made by joint action of the participating foreign and American carriers. The American carrier, having violated the Act by failure to file any tariff to cover its part of the transportation, collected freight charges found to be excessive and, as one of two or more joint tort-feasors, was held liable to the extent that the charges it exacted were in excess of what the commission ascertained to be just and reasonable. But here the charges collected were not excessive, and confessedly the same amounts lawfully might have been collected without injury or damage to plaintiff if only the connecting carriers had imposed the charges by means of "joint" instead of the "combination" through rates that they did establish.

If defendant's proportional added to that established by the Canadian Pacific had produced an unjust rate, then to the extent that the total charge was excessive, plaintiff would have been subjected to a disadvantage in competing with others selling fuel in the same territory. The Commission has power to determine rates to be unreasonable in violation of § 1 without determining whether their application has resulted or will result in pecuniary loss or damage to the shipper. It may determine whether a proportional constituting a part of a combination rate violates § 1 without passing upon the validity of the rate as a whole. *A., T. & S. F. Ry.* v. *United States,* 279 U. S. 768, 776. But the commission may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable. *News Syndicate Co.* v. *N. Y. C. R. R., supra,* 187. And defendant, enforcing an unlawful charge to be divided between it and the Canadian Pacific, would be liable as a joint tort-feasor for the full amount of the excess. *L. & N. R. R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217, 231, *et seq. News Syndicate Co.* v. *N. Y. C. R. R., supra. Lewis, etc. Co.* v. *Southern Pac. Co., supra.*

But the claim before us has no such foundation. Plaintiff seeks to recover the difference between the proportional established by defendant and that found by the commission to be just and reasonable notwithstanding its fuel was hauled from mines to the competitive field for a just and reasonable charge. That position cannot be maintained for as to the shipments here involved the Great Northern proportional cannot be applied save as it is a part of the through rate. There was a single charge which, though based on the combination rate, was precisely the same in amount as if the rate had been jointly made. As shown by our decision in *L. & N. R. R. Co.* v. *Sloss-Sheffield Co., supra,* 234, the division among connecting carriers of charges based on joint rates—those involved in that case were constructed out of existing proportionals—is no concern of the shipper. The proportionals here involved are but parts of a through rate and cannot be distinguished from divisions of a joint rate. *Morrell & Co.* v. *N. Y. C. R. R. Co.,* 104 I. C. C. 104, 128. The shipper's only interest is that the charge shall be reasonable as a whole. It follows that retention by the defendant of an undue proportion of just and reasonable charges did not damage plaintiff. *L. & N. R. R. Co.* v. *Sloss-Sheffield Co., supra,* 234. *Parsons* v. *Chicago & Northwestern Ry.,* 167 U. S. 447, 460.

Reversed.